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# Enforcement, Voluntary Compliance, and the Federal Trade Commission

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# ENFORCEMENT, VOLUNTARY COMPLIANCE, AND THE FEDERAL TRADE COMMISSION

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AND

EUGENE R. BAKER††

## I. INTRODUCTION

The use of power, not power itself, is the concern of this article. Few dispute the broad sweep of that section of the Federal Trade Commission Act holding unlawful "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce."<sup>1</sup> Any murmurings of doubt appear to have been stilled by the Supreme Court.

The "unfair methods of competition" which are condemned by Section 5(a) of the [Federal Trade Commission] Act, are not confined to those that were illegal at common law or that were condemned by the Sherman Act, *Federal Trade Commission v. Keppel & Bros.*, 291 U.S. 304. Congress advisedly left the concept flexible to be defined with particularity by the myriad of cases from the field of business. *Id.* pp. 310-312. It is also clear that the Federal Trade Commission Act was designed to supplement and bolster the Sherman Act and the Clayton Act (see *Federal Trade Commission v. Beech-Nut Co.*, 257 U.S.

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†† Mr. Baker is presently an Attorney-Adviser to a Federal Trade Commissioner. At the time of the drafting of this article he was a trial attorney in the Division of Mergers within the Bureau of Restraint of Trade. His contribution to the article is that portion dealing with legislative history. He has not contributed to the other sections, nor does he necessarily adopt them as reflecting his own personal views, nor are they necessarily those of the Federal Trade Commission.

1. 52 Stat. 111 (1938), 15 U.S.C. § 5 (1958). As originally enacted § 5 of the Act declared, "That unfair methods of competition in commerce are hereby declared unlawful." Federal Trade Comm'n Act, ch. 311, § 5, 38 Stat. 719. However, some practices, while unfair, caused no demonstrable injury to competitors, although the public suffered. Federal Trade Comm'n v. *Raladan Co.*, 283 U.S. 643 (1931). To encompass such practices Congress in 1938 amended § 5 to strike at "unfair or deceptive acts or practices in commerce."

*Cf.*, Handler, *Recent Antitrust Developments*, 71 YALE L.J. 75, 95 (1961):

There is no general authority in the Commission to formulate codes of permissible business behavior or to introduce into the fabric of competitive regulation its personal predilections of what is good or bad for the economy. There is no authority to label conduct as an unfair method of competition where Congress has spoken on the general subject but what it has said does not go as far as the Commission would like. For the Commission to do any of these things is not to reason by analogy or upon principle, but is to usurp legislative powers.

447, 453)—to stop in their incipency acts and practices which when full blown, would violate those Acts (see *Fashion Guild v. Federal Trade Commission*, 321 U.S. 457, 463, 466), as well as to condemn as "unfair methods of competition" existing violations of them. See *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 691.<sup>2</sup>

Save those areas specifically exempt from FTC jurisdiction, the scope of section 5 spans much of this nation's economy.<sup>3</sup>

Yet, despite this broad jurisdiction the ultimate sanction which the Commission may impose in its enforcement effort is the cease and desist order. With few exceptions no criminal penalties await violators of commission administered statutes.<sup>4</sup> Unlike the Justice Department, the FTC lacks the weapon of the temporary injunction;<sup>5</sup> for this purpose it

2. *Federal Trade Comm'n v. Motion Picture Advertising Serv. Co.*, 344 U.S. 392, 395 (1953). See *Federal Trade Comm'n v. Cement Institute*, 333 U.S. 683 (1948); *Hastings Mfg. Co. v. Federal Trade Comm'n*, 153 F.2d 253 (6th Cir. 1946). For a discussion of this proposition see, Baker & Baum, *Section 5 of the Federal Trade Comm'n Act: A Continuing Process of Redefinition*, 7 VILL. L. REV. 517 (1962).

3. 52 Stat. 111 (1938), 15 U.S.C. § 41 (1958):

The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938, and persons, partnerships, or corporations subject to the Packers and Stockyards Act 1921, except as provided in section 406 (b) of said Act, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

4. See 38 Stat. 723 (1914), 15 U.S.C. § 50 (1958). (1) Any person failing to comply with any valid Commission subpoena may be convicted and fined not less than \$1,000 nor more than \$5,000, and/or imprisoned for not more than one year. (2) A sentence of not more than three years imprisonment and the same fines may await one who wilfully distorts corporate records through, for example, false entries, or who wilfully refuses to submit documentary evidence to the Commission. (3) For failure to submit any annual or special report required by the FTC a corporation shall forfeit to the United States the sum of \$100 for every day of the continuance of such failure past 30 days after notice of default. It must be noted, however, that enforcement proceedings must be brought by the Attorney General, not by the Commission. Moreover, "the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States." *Ibid.* See also, The Wool Products Labeling Act of 1939, 54 Stat. 1128 (1940), 15 U.S.C. § 58 (1958). Section 6(b) of this Act requires manufacturers to preserve records of fiber content of wool products. Neglect or refusal to maintain and preserve such records for the required time may result in forfeiture of \$100 for each day of such failure. 54 Stat. 1131 (1940), 15 U.S.C. § 68(d) (1958). For the stringent penalty provisions of other sections of this statute see § 10, 54 Stat. 1133 (1940), 15 U.S.C. § 68(h) (1958).

5. Under the Wheeler-Lea Amendment the Commission does have extremely limited power to obtain a temporary injunction. 52 Stat. 115 (1938), 15 U.S.C. § 53 (1958). This sanction may be invoked only as to false advertising of food, drugs, devices, or cosmetics. Yet, unlike other statutory grants the FTC, itself, may request a court to grant the injunction through any designated attorney. It need not rely upon the Attorney General.

The efforts by the Commission to obtain comprehensive temporary injunctive powers have been continuous and have found some support in Congress. See H.R. 8830 and

does not have access to a court of equity. More, its investigative forces, though well-armed,<sup>6</sup> seek facts from a business community that often looks upon the FTC merely as an agency; requests for information do not conjure up the image of either the Federal Bureau of Investigation or a grand jury and are not met with the public acceptance granted those two bodies.<sup>7</sup> And finally, the Commission's very existence as an *independent* agency deprives it of the executive imprimatur placed upon the Justice Department.

To a large extent the Commission walks alone. In a world of Lilliputians it could be a Gulliver. The world of business, however, is not populated by Lilliputians. Rather, it is characterized by a growing, dynamic economy influenced by massive enterprises. In this world the Commission must live and face reality. With a total of 1,072 permanent staff members in 1962<sup>8</sup> and armed with the cease and desist order the Federal Trade Commission must "take its own measure" and "view in perspective the laws which it administers and its capacity to administer them."<sup>9</sup> It must ask the questions: "What are this agency's goals? How

S. 2552, 87th Cong. 1st Sess. (1961). More will be said of these in the section concerned with the use of power.

6. The powers include the right to subpoena either testimony or documents, demand special reports, and have access to and the right to copy corporate records. 38 Stat. 721, 722, 723 (1914), 15 U.S.C. §§ 46, 49, 50 (1958). The subpoena and special reports provisions have proved quite effective while the right to access has been dealt with harshly by the courts. See *Hunt Foods & Indus. v. Federal Trade Comm'n*, 286 F.2d 803 (9th Cir.), *cert. denied*, 365 U.S. 877 (1961) [subpoena]; *St. Regis Paper Co. v. Federal Trade Comm'n*, 368 U.S. 208 (1961); *United States v. Morton Salt Co.*, 338 U.S. 632 (1950) [special reports]; *Federal Trade Comm'n v. American Tobacco Co.*, 264 U.S. 298 (1924) [access].

7. The fruit of the work of the FBI or a grand jury relates more directly to what will or might be placed in evidence before a court. Conversely, what an FTC investigator does, may ripen into and be used only in an agency hearing.

Thurman Arnold put the proposition this way:

In other words, a court is a body toward which we take an attitude of respect because we use it to symbolize an ideal of impersonal justice. A bureau is a body which has little symbolic function, and which therefore is entitled to no greater respect than are the individuals composing it. A court escapes criticism just as the church used to escape criticism, because it cannot be criticized without seeming to attack the whole governmental structure.

ARNOLD, *THE BOTTLENECKS OF BUSINESS* 102 (1940). In sum, the argument goes, the Attorney General, the FBI, the grand jury all stand in a large sense as agents of the court. The FTC stands alone. (Then, of course, Mr. Arnold did serve as Assistant Attorney General in charge of Antitrust.)

Chairman Dixon of the FTC, however, has written: "I emphasize that in its investigational work the Commission wants, encourages, and, more often than not, gets the voluntary responses of businessmen to requests for information." Dixon, *The Federal Trade Commission: Its Fact-Finding Responsibilities and Powers*, 46 MARQ. L. REV. 17, 19 (1962).

8. This represents an increase over the 838 permanent staff members in 1961. *Hearings on H.R. 12711 before the Subcommittee of the Senate Appropriations Committee*, 87th Cong. 2d Sess. 976 (1962).

9. Address by Chairman Dixon, "The Federal Trade Commission in 1961," to the

may they best be achieved?"<sup>10</sup>

The quest for solutions may take one of many directions. This article will probe several avenues; first, the legislative history behind the Federal Trade Commission Act. Next it will set in relief against the legislative history that which the Commission has done. Finally, and with no small measure of modesty, it will offer suggestions which, hopefully, might lead toward effecting a more perfect Commission.<sup>11</sup>

## II. LEGISLATIVE HISTORY

An agrarian economy dependent upon the individual gave way at the turn of the century to impersonalized industry. The effect upon the citizenry was immediate; no longer could they escape the city for a western homestead. The frontier was closed; the sprawling corporation or stockholding trust could not be ignored.<sup>12</sup> Some, however, viewed the results of pooled capital as inevitable. In 1897, as a member of Massachusetts' highest court, Mr. Justice Holmes declared that ever-increasing combination was an immutable characteristic of society.<sup>13</sup>

It is plain from the slightest consideration of practical affairs, or the most superficial reading of industrial history, that free competition means combination, and that the organization of the world, now going on so fast, means an ever-increasing might and scope of combination. It seems to me futile to set our faces against this tendency. Whether beneficial on the whole, as I think it, or detrimental, it is inevitable, unless the fundamental axioms of society, and even fundamental conditions of life, are to be changed.<sup>14</sup>

Others rejected the analysis of Mr. Justice Holmes either in whole or in part. Action, not explanation, was the cry of the farmer exploited

Section on Antitrust Law of the New York State Bar Association, New York, N.Y., January 25, 1962, p. 1.

10. *Ibid.*

11. Said Mr. Justice Holmes on circuit:

The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment may not be set out in terms, but it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before. *Johnson v. United States*, 163 Fed. 30, 32 (1st Cir. 1908). It need only be added that what is true for the judiciary is valid as to an agency.

12. This Chief Justice Taft recognized in *American Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184, 209 (1921); see also *Cox & Box, LABOR LAW* 9-10 (1962).

13. *Vegeahn v. Guntner*, 167 Mass. 92, 44 N.E. 1077 (1896).

14. *Id.* at 108, 44 N.E. at 1081.

by the railroads, which were among the first of the industrial titans. "The Populist's bugles called for a Pickett's charge on Wall Street. This found expression in larger jury verdicts against railroads, in the creation of the Interstate Commerce Commission, in the creation of various state railroad commissions, and in the passage of the antitrust statutes. On March 30, 1889, the State of Kansas passed the first antitrust statute."<sup>15</sup>

From Congress came a three fold approach to the "corporate problem." For the railroad industry, which, by its very nature, could have but limited competition, regulation was imposed by an agency, the Interstate Commerce Commission. For *all* the citizenry, corporate and individual, there applied the Sherman Act of 1890,<sup>16</sup> prohibiting contracts, combinations and conspiracies in restraint of trade as well as monopolization and attempts to monopolize. From the Justice Department came enforcement. Finally, and most important for purposes of this article, the ever-evolving nature of business was recognized.

Almost ten years before the judiciary brought the "Rule of Reason" to the Sherman Act, Congress indicated its understanding of the statute's inadequacies. True, for wrongs done remedies must be found. This was a function of Sherman Act enforcement. More meaningful, however, was keeping pace with the present and anticipating the future. This the Sherman Act could not do. Yet, if the conditions of free, fair competition were to be maintained and enhanced it had to be done.<sup>17</sup>

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15. Wilson, *The State Antitrust Laws*, 47 A.B.A.J. 160 (1961). Mr. Wilson, Attorney General of Texas, wrote:

The economic hinterlands, believing themselves exploited, responded by counterattacking against all of the warring business factions. It was a period in which politics was an extremely personal matter, and so they naturally personalized their business and economic conflicts. The business leaders of that day saw themselves as adventurous pioneers and soldiers of liberty binding together the nation with networks of railroads, marketing facilities and capital. They considered themselves to be the architects and builders of a strong nation, and they were right. They owned the business they ran. Their agrarian opponents saw these same men as merciless and cruel exploiters, completely selfish, living by no rules and guided by no ethics, and in general as denizens of an economic jungle who preached and believed in the Darwinian concept of the survival of the fittest. And they also were right.

*Ibid.*

16. Act of July 2, 1890, ch. 647, 26 Stat. 209 (amended by 50 Stat. 693 (1937), as amended, 15 U.S.C. §§ 1-7 (1958)).

17. For a relatively recent example of this proposition consider the following: The Attorney General, responding to a presidential directive of April, 1937, that he investigate identical bids on certain steel products declared:

The administrative and quasi-judicial remedies in the hands of the Federal Trade Commission may be better adapted to the control of the subject matter of this particular complaint than action by the Department of Justice. The identical bids in the steel industry are produced in part, by the basing point system of price determination. This system, long used in the steel industry, not only affects the manufacturers who utilize it and the consumers who are subject

Thus, it was at the turn of the century that Congress considered the creation of an agency charged with studying and reporting on the "corporate problem" to the public. The use of publicity, as an enforcement tool, was probed by the Congress:

The publicity secured by the governmental agency should be such as will prevent the deception of the public. . . . Such agency would also have at its command the best sources of information regarding special privileges or discrimination of whatever nature by which industrial combinations secure monopoly or become dangerous to the public welfare.<sup>18</sup>

On February 14, 1903, the Bureau of Corporations came into being. Established as a unit within the Department of Commerce the Bureau set about its task of gathering, sorting, and disseminating information. Largely dependent upon voluntary compliance with its requests<sup>19</sup> the

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to it, but it also presents economic and social questions due to the fact that communities as well as plants have been located and developed with reference to the price structure developed by this system. The machinery of the courts is not geared to the handling of the social and economic factors necessarily involved; and many persons and communities seriously affected cannot be parties to a court proceeding under the antitrust laws. It appears therefore, that a problem is presented which can be more satisfactorily investigated and dealt with through the more flexible remedies of the Federal Trade Commission.

White House Press Release, April 27, 1937, in Rockefeller, *Antitrust Enforcement: Duopoly or Monopoly*, 1962 Wis. L. REV. 437, 443-44.

18. 19 *Final Report of the Industrial Commission* 650-51 (1902). Further, "the creation of this bureau will make it the duty of an officer of the government to deal with the matter of corporate information and to acquire knowledge and report on conditions concerning the manner and extent to which corporations transacting interstate commerce shall be subjected to the influence of national legislation." 51 CONG. REC. 14939 (1914).

19. In fact, however, the Bureau as originally conceived was to have "the same power and authority . . . as is conferred on the Interstate Commerce Commission . . . including the right to subpoena and compel the attendance and testimony of witnesses and the production of documentary evidence. . . ." Act of Feb. 14, 1903, ch. 552, § 6, 32 Stat. 827, 828. In 1906, the Commissioner of Corporations, Mr. Garfield, pursuant to a congressional resolution, and after conferring personally with President Roosevelt, demanded access to the books and records of Armour and Co., Inc. At some point during the negotiations with numerous Armour attorneys, a moment of truth arose. Did Mr. Garfield intend to turn over the information obtained to the Department of Justice for use in the Grand Jury proceedings against Armour? Garfield seemingly replied in the negative. The District Court ruled:

The record further shows that this evidence was demanded by the Department of Justice for the purposes of this prosecution and that Garfield declined to give it, as he had promised the defendants it would not be used; that later, upon repeated demands of the Department of Justice, and upon the orders of the President, he turned it over to that department. It is contended that as to all such evidence the [individual] defendants are entitled to immunity under the independent and unconditional act of February 25, 1903 [The Bureau of Corporations Act] and I am of the opinion that they are so entitled.

United States v. Armour & Co., 142 Fed. 808, 826 (N.D. Ill. 1906). Of course, the case was cited by those legislators pointing to the need for a commission independent of

Bureau, nevertheless, amassed enough facts to aid indirectly in successful Sherman Act proceedings against the tobacco and beef trusts.<sup>20</sup> Still the Bureau could not achieve the goals envisioned. It was, after all, merely an extension of the executive; of necessity, independent investigation would conform to the policy of the administration. Though cooperation existed between business and the Bureau there was absent the use of compulsory process required for the speedy flow of information. Finally, viewed in the context of effective publicity, the Sherman Act was the sole standard against which the factual results of these studies could be measured. At the time, however, the act extended but slightly the common law.<sup>21</sup>

Thus, it was that Senator Newlands on July 8, 1911, introduced a bill designed to require the registration of interstate corporations.<sup>22</sup> Further, all enterprises subject to the act<sup>23</sup> would furnish to an *independent* commission such information "of their organization, business, financial condition, conduct and management at such time and to such degree and extent and in such form as may be prescribed by the said regulations

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the executive with the power to proceed against individuals. The executive had severely limited the use of compulsory process granted the Bureau, and could not itself use the information so gained against the witnesses in a judicial proceeding.

20. A cursory examination of the REPORT OF THE COMMISSIONER OF CORPORATIONS ON THE TOBACCO INDUSTRY (1909) and the REPORT OF THE COMMISSIONER OF CORPORATIONS ON THE BEEF INDUSTRY (1905) produces a certain depression in the mind of reader. Legal landmarks they may be, but the government's prosecutions have wrought little change in the structure of these industries. See, however, *United States v. Swift & Co.*, 286 U.S. 106 (1931), and the more recent decision in 189 F. Supp. 885 (N.D. Ill. 1960), *aff'd per curiam*, 367 U.S. 909 (1961), in which a 1920 consent decree by certain meat-packers was maintained.

21. In *Standard Oil Co. v. United States*, 221 U.S. 1 (1911), the Court adopted the dissenting opinion of Mr. Justice White in *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897), in which he said:

[I]t seems to me . . . impossible to construe the words every restraint of trade used in the act, in any other sense than as excluding reasonable contracts, as the fact that such contracts were not considered to be . . . in restraint of trade, was established both in England and in this country, at the time the act was adopted.

*Id.* at 354.

Senator Newlands said of the "Rule of Reason":

The question therefore presents itself to us whether we are to permit in the future the administration regarding these great combinations to drift practically into the hands of the courts and subject to the question as to the reasonableness or unreasonableness of any restraint upon trade . . . to the varying judgments of different courts upon the facts and the law, or whether we will organize, as the servants of the Congress, an administrative tribunal similar to the Interstate Commerce Commission, with powers of recommendation, with powers of condemnation, with powers of correction similar to those enjoyed by the Interstate Commerce Commission over interstate transportation.

47 CONG. REC. 1225 (1911).

22. S. 2941, 62d Cong., 1st Sess. (1911).

23. The bill applied only to corporations and their subsidiaries. See 47 CONG. REC. 2444 (1911).



[of the Commission] to be made under this act."<sup>24</sup> What it received could be made public.<sup>25</sup> And, either on its own initiative or upon the complaint of another the Commission could cancel the registration of any corporation in "violation of any operative judicial decree rendered under" the Sherman Act.<sup>26</sup>

Commenting on the Newlands' bill, Herbert Knox Smith, then Commissioner of Corporations, said:

The one imperative change now required in our policy towards the "corporate problem" is a change from our present system of treating that problem through occasional prosecutions to a system which will treat it with continuous administrative action. We should advance from a negative policy to a positive constructive policy; from mere occasional prohibition to permanent regulation and prevention.<sup>27</sup>

How to achieve the desired end presented another problem. Mr. Smith doubted whether the functions of publicity and prosecution could be fused as the Newlands' bill proposed:

One of the primary objects of the commission is the providing of proper publicity. This should not be combined with the administration of the Sherman law. It is probably true that efficient publicity is inconsistent with prosecution by the same office. The Bureau of Corporations, the present agent of corporate publicity, secures now at least nine-tenths of its information by voluntary cooperation. The interstate trade commission [proposed by Senator Newlands] would continue this work, but should the function of prosecution under the Sherman law be combined with publicity, it is obvious that the present voluntary

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24. Section 8 of the bill provided:

That all corporations subject to this Act and their respective subsidiaries shall from time to time furnish to the Commission such information, statements and records of their organization, business, financial condition, conduct and management at such time and to such degree and extent and in such form as may be prescribed by the said regulations to be made under this act.

25. Section 9 declared: "That the commission shall from time to time make public the information received under this act, as shall be prescribed by the said regulations."

26. Section 10 stated:

That said Commission may at any time upon complaint of any person, corporation, or body, or upon its own initiative, revoke and cancel the registration of any corporation registered under this act upon the ground of . . . violation of any operative judicial decree rendered under an act to protect trade and commerce against unlawful restraints and monopolies, approved July 2, 1890.

27. S. Rep. No. 597, 63d Cong., 2d Sess. 30 (1914).

cooperation of corporations, the main source of information, will very largely be destroyed.<sup>28</sup>

What, then, did Mr. Smith see as the primary task of the proposed commission? "[I]n general such connection with prosecution should be wholly incidental and secondary, and the publicity work of the Commission should be directed primarily at furnishing reliable economic and financial information for the general public and not at securing evidence for prosecution."<sup>29</sup>

The Newlands' bill did not ripen into statute. Repeated efforts on his part for two succeeding years, including refinements of his original proposal, met with an attentive, but not fully convinced Congress.<sup>30</sup> 1913, however, was a time for decision. Pursuant to Senate resolution,<sup>31</sup> that body's Interstate Commerce Committee had completed a searching and comprehensive inquiry into the need for additional antitrust legislation.<sup>32</sup>

The Committee held fast to a legislative policy fostering competition; the ascendancy of the trusts did not alter their view. Said the Committee's majority report: "It is frequently asserted that the law cannot compel men employed in like business to compete with each other. There is a sense in which this is true, but it is only technically true. What is meant when we use the phrase 'maintaining competition' is maintaining competitive conditions . . . when competitive conditions exist there will be actual competition."<sup>33</sup> But the reporting Senators disagreed with Mr. Smith, Commissioner of the Bureau of Corporations. The function of publicity should not be isolated. "[I]t is clear that constant inquiry

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28. *Ibid.*

29. *Ibid.*

30. Senator Newlands later introduced S. 5845, 62d Cong., 2d Sess., on Feb. 26, 1912, and also amended S. 5845 (known as S. 829), on April 12, 1913. By these bills, the Commission was given the power to inquire into "the organization, business, financial conduct (of interstate corporations) to such degree and to such extent . . . as may be prescribed by the commission." Again it was stated that "The information so obtained shall be public records and the Commission shall from time to time make public such information in such form and to such extent as it may deem necessary." In S. 5485 there was no size limit on the corporations who were to report. Nor was there a national incorporation provision. Provisions giving the Commission the power to enforce any violations of law were completely lacking. The most vigorous remedies available to the Commission under S. 5485 were (1) to make a report to the Congress recommending additional legislation and (2) after hearings in which violation of the Sherman Act were found, to recommend "readjustments" so as to bring about compliance with the antitrust law. If the corporation failed to comply, the Commission could report the case to the Attorney General.

31. S. Res. 98, 62d Cong., 1st Sess. (1911). For the text of the resolution see 47 CONG. REC. 3225-26 (1911).

32. S. Rep. No. 1326, 62d Cong., 3d Sess. (1913). During the three months of hearings 103 witnesses testified to make a transcribed record of 2,800 pages.

33. *Id.* at 3.

into and investigation of interstate commerce in order to ascertain whether the law is being violated should be more closely connected with prosecutions for violations, when found to exist than at the present time."<sup>34</sup>

This much, however, was certain: The Bureau of Corporations was not adequate. Change was needed; the issue was how much. Representative Covington, sponsoring H.R. 15613, "a bill to create an interstate trade commission," sought to hone the knife of publicity.<sup>35</sup> Independence was to be given to the Bureau; no longer was it to be a part of the executive. More, its powers were to be enlarged:

- (1) To aid the Department of Justice in framing dissolution and divestiture decrees in Sherman Act cases.
- (2) To receive annual special reports from corporations of a certain size.
- (3) To investigate possible violations of the antitrust laws and report to the Attorney General.
- (4) To make reports to the President or the Congress on the need for additional legislation.<sup>36</sup>

Mr. Covington believed himself to be carrying forward the broad goals of President Wilson. "[The President] recommended the creation of an interstate trade commission as an instrument of information and publicity, and as a clearing house for the facts by which both the public

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34. *Id.* at 12.

35. H.R. 15613, 63d Cong., 2d Sess. (1914). For a summary and analysis of the bills presented see, Baker & Baum, *Section 5 of the Federal Trade Commission Act: A Continuing Process of Redefinition*, 7 VILL. L. REV. 517, 525-44 (1962).

36. Section 9 of H.R. 15613 declared that all corporations engaged in interstate commerce having a capital of over \$5,000,000 must file annual reports. The annual reports were to contain information as to the financial condition, organization, bondholders, stockholders, relations to other corporations and business practices while engaged in interstate commerce. Because of the fear that small corporations might sometimes be guilty of violations of law, the commission had the power to classify all corporations so that one or a group of small corporations might also be required to file annual reports. If the annual report of a particular corporation did not satisfy the Commission, it had the power to ask for special reports from that corporation.

In addition to these powers of publicity, under § 10 of the bill the Commission was required by the directive of the President, the Attorney General or either House of Congress to investigate and report the facts relative to any alleged violation of the antitrust acts. It could include in its reports recommendations for readjustment of business so that the corporations investigated could operate lawfully. To aid the Commission in fulfilling these publicity functions it was given two powers: (1) Subpoena against documents and witnesses; (2) Access to and the right to copy "any documentary evidence of any corporation being investigated or proceeded against."

Finally, under § 17, compulsory publicity of annual and special reports of each corporation was brought about by requiring its inclusion in the required annual report of the Commission.

mind and the managers of great business undertakings should be guided."<sup>37</sup>

Yet, for the Commission to be effective it had to be respected by all. Hence, Mr. Covington reasoned:

The dignity of the proposed commission and the respect in which its performance of its duties will be held by the people will also be largely because of its independent power and authority. Therefore, the bill removes entirely from the control of the President and the Secretary of Commerce the investigations conducted and the information acquired by the commission under the authority heretofore exercised by the Bureau of Corporations or the Commissioner of Corporations. All such investigations may hereafter be made upon the initiative of the commission, and the information obtained may be made public entirely at the discretion of the commission.<sup>38</sup>

From the light of publicity, from the disclosure of unadorned facts, would come two results. The public would stand informed, and thus better able to judge the problems of competition both as individuals and through their representatives in government.<sup>39</sup> The business community

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37. 51 CONG. REC. 8840 (1914). President Wilson had stated, referring to the "trust problem,"

[T]hey [businessmen] desire the advice, the definite guidance, and information which can be supplied by an administrative body, an interstate trade commission . . . [but] I would not wish to see it empowered to make terms with monopoly or in any sort to assume control of business, as if the government made itself responsible.

*Ibid.*

38. *Id.* at 8842. Representative Willis added: "No commissioner of corporations, no officer who is responsible to the President or who is responsible to any cabinet officer or to any political campaign committee has the power to say whether or not these facts should be made public. . . . These facts are for the benefit of the people. They are to be given to the public at the discretion of the interstate trade commission." *Id.* at 8983.

39. Nor was Mr. Covington's the only voice raised in favor of publicity as a weapon against corporate malpractice. Said Mr. Willis, referring to § 8 of H.R. 15613: "I invite the attention of Members of the House to the fact that every publicist . . . who has written on the subject of our industrial relations and the corporations question, has insisted that the most potent and available remedy is publicity. Turn on the light of publicity. Give the people the facts. That is the project that is contemplated in this section here." *Ibid.*

Mr. Talcott of New York declared:

The Commission, by the information which it can give, will make present conditions known and honest business men will conform their practices and methods to them and those who pursue methods and practices of another kind will find that the disclosures of the Commission will render unfair dealings much more difficult and less profitable. . . . So the publicity produced by the bill should increase efficiency in production and distribution.

*Id.* at 8980.

would understand practices which otherwise might have evaded them in the rush and complexity of events.<sup>40</sup> In sum, said Representative Willis: "If we want to improve conditions in a city, the best way to do it is not to have more policemen, not to attach more severe penalties to the commission of certain offenses, but to give that city more light, to provide better lighting facilities; and it is the same way with great corporations in the industrial world."<sup>41</sup>

Opposition to the Covington bill was immediate. To the Progressive Party publicity was palliative. The "corporate problem" was known; why bore the country with details. Action, not words, was needed to strike at the trusts. With no great subtlety Representative Murdock declared:

Now Mr. Chairman . . . the underlying philosophy of the pending measure—the Covington bill—is a sort of childlike belief in the potency of publicity; and, let me say, we in Congress seem to have a pathetic reliance upon publicity and its powers and a singular indifference to our experience in the past with the failures of publicity to correct.<sup>42</sup>

However, critics like Mr. Murdock did not prevail.<sup>43</sup> A bill designed to

40. Brandeis, before being raised to the Supreme Court, was an influential practicing attorney active in the effort to create a Federal Trade Commission. When the Commission was established the new Commissioners called upon him for advice. He, too, believed in enlightened publicity. See Statement of Louis D. Brandeis Before the Federal Trade Commission, April 30, 1915 (Mimeo.):

You [the FTC] can bring out the actual demand and supply, and the capacity on any given line. Men don't know anything about that. . . . Our lack of organization in business is a lack of knowledge. . . . The trouble with our business is that men have been keeping as secrets things which would be beneficial to the public to know. Now, I believe that the real way to mend this [wasteful, destructive] terrible competition which is leading men to want to make these agreements [in restraint of trade] is to play the game with the cards right up on the table. A large part of this whole business can be done by letting the people see what the matter is. Our whole tendency has been to lead the people to believe that things ought to be secret. . . . There is no reason why facts should not be made public, and you are in a position where you can give to the public, through your investigation, the means of obtaining this result. . . .

*Id.* at 11.

41. 51 CONG. REC. 8983 (1914).

42. *Id.* at 9054.

43. Their proposals were ruled out of order. 51 CONG. REC. 9059-65 (1914). Another dissenter, Representative Morgan, said:

The Covington trade commission is not modeled after the Interstate Commerce Commission, as a considerable portion of Congress believes. It is merely an enlarged Bureau of Corporations. It collates facts. It may or may not make its findings public; but whether its findings are made public or not, it cannot act on its findings. It may find evil practices and recommend correcting adjustments, but it cannot compel correction.

*Id.* at 8977.

sharpen the power of publicity was passed by the House. It called for the creation of an independent agency with the right to use compulsory process in achieving the statutory goals.<sup>44</sup>

The mood of the Senate differed from that of the House. Out of the Senate Interstate Commerce Committee came a bill that combined the functions of publicity and prosecution. Refining the existing provisions of the House bill the Committee added a significant prohibition against "unfair competition" which the proposed Commission was to enforce through orders to cease and desist.<sup>45</sup> Not only would the Commission investigate and publicize but also prosecute and judge. Moreover, court review of agency orders was limited. Commission findings, if supported by substantial evidence, would be binding upon the court.

Under the elastic standard of unfair competition, the Commission was to fulfill its role.<sup>46</sup> The question to many, however, was the precise nature of that role. No longer could one see merely an enlarged Bureau of Corporations, though the proposed agency would have all of the duties of the Bureau. Senator Sutherland said:

[T]his commission, for almost any conceivable purpose, is given the power to compel the production of all the papers and of all the books and of all the documents of any corporations and to investigate its relations with individuals and corporations, whether or not those relations relate to interstate commerce. . . . And it may do that with a view of recommending legislation to Congress; it may do it with a view of exercising its powers as a publicity bureau to acquaint the public with what they have found out or for any conceivable, unknown reason which may appeal to them.<sup>47</sup>

Senator Lippitt concurred:

I think it is also a great source of danger that in addition to the commission being first charged with . . . detective duties it is also empowered to act in a judicial capacity. . . . As it is the evidence their own representatives have collected which is

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44. Those facts which ought to be the common property and the common knowledge of American businessmen are for the first time to be gathered and controlled as to their publicity by an independent commission. Powers of investigation safeguarded by proper constitutional limitations, are taken from a now subordinate department and given to this nonpartisan body.

H.R. REP. NO. 533, 63d Cong., 2d Sess. 8 (1914).

45. S. REP. NO. 597, 63d Cong., 2d Sess. (1914).

46. See Baker & Baum, *Section 5 of the Federal Trade Commission Act: A Continuing Process of Redefinition*, 7 VILL. L. REV. 517 (1962).

47. 51 CONG. REC. 12811 (1914).

the basis of their decisions, they must have every reason to uphold its integrity. . . .<sup>48</sup>

An answer to Senators Sutherland and Lippitt was forthcoming. The Commission's powers were not to be viewed in isolation, for they were as one. Enforcement through the use of the cease and desist order made publicity more effective. Indeed, the statutory criterion, unfair methods of competition, was designed to fit the fact-finder: What would constitute an unfair method of competition was subject to a constant process of re-definition. It could be suited to changing business patterns. It could be invoked only if the facts themselves demonstrated unfairness.<sup>49</sup> Said Senator Cummins, a proponent and leader of those favoring the Senate committee's bill:

I agree with you regarding the weakness in the organization of the Bureau of Corporations. *But publicity is of no value unless the facts that are discovered can be compared with some rule of conduct which the law has laid down for the government of the corporations. It is bringing the force of public opinion to bear upon corporations to induce them or compel them to obey the law, and if you have no law publicity is of minor importance.*<sup>50</sup>

In the light of Senator Cummins' answer, how, then, were the multiple investigative powers to be used? Were they viewed independently of the sanction provision? Consider the following exchange between Senators Sutherland and Lewis:

MR. SUTHERLAND: . . . I call the Senator's attention to the fact that under Section 3 of this trade commission bill the power which is conferred upon the trade commission to require the production of books and papers of a corporation is a substantive power; that is, it is not incidental to some other power. . . .

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48. *Id.* at 13212. Senator Lippitt continued:

The powers given to the commission are such that it must act at times as a sort of National police or detective force prying, in the name of investigation, into the doings of practically everyone engaged in business; and doing it not because there is necessarily any apparent evidence of wrong doing, but because that is made the general duty of the commission—the primary purpose for which it is created. . . . Therefore they are given an incentive to believe every act wrong which on its face is of doubtful character.

*Ibid.*

49. By way of example, see the remarks of Senator Newlands, 51 CONG. REC. 12030 (1914), and Senators Borah and Culberson, 51 CONG. REC. 15829 (1914).

50. *Id.* at 11093. (Emphasis added.)

The Senator will observe that the power is not given to this trade commission in connection with an investigation as to whether or not unfair competition has been practiced by a corporation or in connection with any charge that it has violated a law or any other specific purpose, but it is given as a power substantive and absolute in itself. Another power conferred upon the commission is to make public any statement or information which it may obtain in that way. Another power is to recommend to Congress legislation. . . .

Mr. LEWIS: My judgment is that section 5 defines the soul of the bill—its object to wit, to prevent unfair competition; and if you should strike out of the bill, the body would die. . . .

Mr. SUTHERLAND: If I understand the Senator he thinks that this power that I have read, contained in subdivision (b), section 3, is a power to be exercised in connection with an inquiry as to whether or not unfair competition has been produced.

Mr. LEWIS: That I answer in the affirmative; yes.<sup>51</sup>

What of general investigations for the purpose of proposing legislation? Was the Commission's concern to be directed entirely toward administrative adjudicatory proceedings? Once more, Senator Sutherland was the interlocutor:

Mr. SUTHERLAND: Again, let me see if I understand the Senator. One of the powers given to this commission is to make public the facts that they may learn. Does the Senator think the commission may require the production of all books and papers, and so on, in order that what it discovers may be made public?

Mr. LEWIS: No; I answer the Senator. He misapprehends the purpose of the bill completely if that is his idea. The matters made public in the bill relate only to those things that have been brought before the commission for one of two purposes . . . aid to legislation, which would not be a matter which any one could complain of, or to demonstrate a violation complained of as touching unfair competition. It does not allow, as I apprehend the bill, that matters may be made public without regard to any object whatever except publicity.<sup>52</sup>

The mood of the Senate was indeed different from that of the House. Facts in themselves to Senate leaders meant little. They had

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51. *Id.* at 12928-29.

52. *Id.* at 12929.



meaning only if a frame of reference existed, only if a practice could be measured against a standard. Then the people and honest businessmen would have a precise object on which to focus. Economic facts standing alone were too complex; they diffused the light of publicity. Whether the purpose was proposed legislation or judging business conduct, an investigation would have a standard and the supporting facts accordingly could be analyzed. Investigation and enforcement were to operate in tandem. Facts gathered were to be synthesized either in the form of an order to cease and desist or as proposed legislation. Then publicity was to be accorded the agency's findings.

This was the view of the Senate majority. The bill proposed by that body's Interstate Commerce Committee was accepted.<sup>53</sup> In conference that view again won.<sup>54</sup> The House agreed to the conference report,<sup>55</sup> and a Federal Trade Commission was created.

### III. THE USE OF POWER

To effect the ends of Congress, the Commission was not to rely solely on publicity, the agency was vested with the right to invoke legal sanctions. With that right went the responsibility for insuring the conditions of free and fair competition.<sup>56</sup> No longer did it suffice merely to let the people know and await their reaction. Within the limits of its power the Commission had an affirmative duty to effectuate the desired results.

Yet, how was the Commission to fulfill the assigned task? The very power it held was not readily suitable for judgment of a swiftly changing economy. Cease and desist orders could only be entered after hearing; they had to be supported by substantial evidence; and there always existed the right of appeal to the courts. No magical speed came with the administrative process.<sup>57</sup> Indeed, Thurman Arnold had written:

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53. 51 CONG. REC. 13319 (1914).

54. *Id.* at 14802.

55. *Id.* at 14943.

56. Dissenting in *Federal Trade Comm'n v. Gratz*, 253 U.S. 421, 435 (1920) Mr. Justice Brandeis said:

The task of the Commission was to protect competitive business from further inroads by monopoly. It was to be ever vigilant. If it discovered that any business concern had used any practice which would be likely to result in public injury—because in its nature it would tend to aid or develop into a restraint of trade—the Commission was directed to intervene, before any act should be done or condition arise violative of the Antitrust Act. . . . Its action was to be prophylactic. Its purpose in respect to restraints of trade was prevention of diseased business conditions, not cure.

57. Yet, more was expected by way of speed than the courts could offer. This the Commission is trying to accomplish. See Statement by Commissioner MacIntyre on the Administrative Court Proposal Before a Meeting of the District of Columbia Bar As-

In 1914 the Federal Trade Commission, an administrative tribunal, was made the spearhead of antitrust enforcement, while the Department of Justice was starved with respect to funds and personnel. The great concentration of industrial power prior to and since the depression grew up in the face of the Federal Trade Commission—not through its fault but because it could never get the power to make effective enforcement possible. It had to appeal to a court even to enforce its own subpoenas. It could make reports. It could issue cease-and-desist orders. It could contribute excellent studies and survey of industrial problems. But it could not act as the spearhead of a drive to maintain a free market for consumers. This was due simply to a traditional deep seated attitude against trusting administrative tribunals with power except in very narrow fields.<sup>58</sup>

On the other hand, the businessman would learn that he could not ignore the administrative process, however slow it might move. The investigative call for documents or testimony was not to be taken lightly. Information vital to a company's operations would be examined by an outsider. What if a competitor should have the opportunity to inspect those records at some future date?<sup>59</sup> Further, the time and effort of company employees and officials might be required in producing data or giving testimony.<sup>60</sup> This time means money to a business.

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sociation, Washington, D. C., May 8, 1962, p. 10. Cf., Friendly, *A Look at the Federal Administrative Agencies*, 60 COLUM. L. REV. 429, 433 (1960).

58. ARNOLD, *THE BOTTLENECKS OF BUSINESS* 99-100 (1940). He continued: The formula of the Sherman Act is a good deal like the formula of due process. It covers every field. It is a background from which exceptions must spring. Only courts of general jurisdiction can express the philosophy of such a background. Administrative tribunals are not protected by the reverence induced by judicial robes. The public will not accept their pronouncements on broad fundamental principles.

*Id.* at 100. One must question these conclusions today. See *Federal Trade Comm'n v. Motion Picture Advertising Serv. Co.*, 344 U.S. 392 (1953); *Federal Trade Comm'n v. Keppel & Bro.*, 291 U.S. 304 (1933).

59. In *H. P. Hood & Sons, Inc., TRADE REG. REP.* ¶ 29461 (March 14, 1961) the Commission defined that which may be opened for public study:

[A]s we have indicated, the Commission should protect the confidential records of persons or corporations involved in proceedings before it insofar as such protection is practicable. Is this duty in conflict with our duty to hold public hearings? We think not. The answer lies somewhere between the Scylla of indiscriminate "*in camera*" rulings and the Charybdis of complete and unnecessary disclosure.

*Id.* at 37793.

60. *Hunt Foods & Indus. v. Federal Trade Comm'n*, 286 F.2d 803 (9th Cir.) *cert. denied*, 365 U.S. 877 (1961) indicates the scope permitted by the courts to Commission subpoenas.

Moreover, should a complaint issue following investigation, it is accompanied by a press release. Two more may follow, one recounting the Hearing Examiner's findings, the other, the Commission's disposition of the matter. Understanding the potential import of a release the present Commission offered a lure to prospective respondents: They would be notified of the FTC's intent to issue a complaint. If, within a reasonable period of time they agreed to enter a consent order, only a single release would be disseminated, containing the complaint and order.<sup>61</sup> Explaining the "speed-up in the handling of consent orders" Chairman Dixon recently said, "Such cases used to drag along for months, with new press releases issued at each stage of the proceedings. Now, each is processed from initial complaint to issuance in about two months. The whole process is done with a minimum of fanfare and only a single press release is issued—at the time of acceptance of the order."<sup>62</sup>

It has been argued, however, that the publicity sanction is not meaningful to the FTC. "[L]aw in books cannot be enforced in the absence of public support of law in action. It is this fact that has made use of the publicity sanction much more effective in some areas of administrative regulation than in others."<sup>63</sup> Further, "the Federal Trade Commission's enforcement of the norm of competition upon business has been more handicapped by public apathy and even hostility toward its pursuit of this objective."<sup>64</sup> Under such circumstances, the argument runs, publicity can have no beneficial effect.

Exception must be taken to this critique. True, one cannot gauge the welcome awaiting the Federal Trade Commission at the hearth of businessmen. But that fact cannot constrict a basic function of government—to set an ideal standard of behavior. By definition the reality falls short of the ideal. Yet, the communication to businessmen of that

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61. FTC R. PRAC., 16 C.F.R. § 3.4(b) (Supp. 1963): "Upon receiving an agreement containing a consent order, the Commission may accept it and issue its complaint, in such form as the circumstances require, and decision, including the order agreed upon, or reject it and issue its complaint and set the matter down for adjudication in regular course. Alternatively, the Commission may take such other action as may be appropriate."

62. Address by Chairman Dixon, "Needed—More Understanding," to the Advertising Federation of America and the Advertising Associates of the West, Washington, D.C., Feb. 6, 1963, p. 6.

63. Rourke, *Law Enforcement Through Publicity*, 24 U. CHI. L. REV. 225, 239 (1957).

64. *Id.* at 239 n.55. The author added: "This is not to imply, however, that any agency deals in its enforcement program with a fixed structure of public opinion. It is in fact the malleability of opinion regarding an agency's program that gives a special importance to the opinion-shaping activities of regulatory agencies." *Id.* at 239.

goal, as well as the type of conduct which falls short of it, is at least a step in the right direction.<sup>65</sup>

The sanctions of publicity and enforcement have been mated in the Commission's consent order proceedings. The press release has been made permanent. Through an Office of Information the Commission has utilized the device of publicity on a systematic and sustained basis.<sup>66</sup> Attempts to challenge its legality have failed. So long as the Commission does not act unfairly or arbitrarily, it matters not that a release injures the business of a respondent.<sup>67</sup> But the reality of the press release and the burden of compulsory process reflect only a part of what a respondent must consider in dealing with the Federal Trade Commission.<sup>68</sup> While the administrative process may move in an awkward fashion, its end result—the cease and desist order—cannot always be ignored. The order may be precise and sweeping in its remedy,<sup>69</sup> for there is little practical

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65. One might suggest that the existence of the Commission's Bureau of Industry Guidance is premised on a belief in business morality. Certainly, the strenuous efforts of former Chairman Kintner and members of his staff attempted to give impetus to business self-regulation. See, Statement by Chairman Kintner, "Good Business Citizenship Requires Maximum Self-Regulation," before a Joint Meeting of the Sales and Advertising Executive Club of St. Joseph Valley and the Better Business Bureau of the South Bend-Mishawaka Area, South Bend, Indiana, Nov. 2, 1960. See also Baum, *Self Regulation and Antitrust: Suppression of Deceptive Advertising by the Publishing Media*, 12 SYRACUSE L. REV. 289 (1961). These efforts have been continued in part under Chairman Dixon.

66. In addition to a weekly News Summary the Commission disseminates generally another publication, "Advertising Alert," which goes to the news media. "It puts them on notice of what we have done or what we have considered is wrong and violative of the law." Testimony of Chairman Dixon, Hearings on H.R. 12711 before the Subcommittee of the Senate Appropriations Committee, 87th Cong., 2d Sess. 979 (1962).

67. *Hughes v. Federal Trade Comm'n*, 63 F.2d 362 (D.C. Cir. 1933). Injunctive relief against the Commission was sought because public notice of the agency's complaint against Hughes was published in trade journals causing injury to its business. In the absence of an allegation that the FTC acted unfairly or arbitrarily, said the court, "We find nothing in the [FTC] act which will warrant this limitation on the Commission's powers, or indeed anything which would indicate that this was the intention of Congress." *Id.* at 363.

68. There are, of course, legal fees. It is obvious that representation in any complex antimonopoly or antideceptive case would be quite expensive. Moreover, the wise businessman knows that representation frequently begins when the Commission first solicits information—long before a complaint might issue.

69. Thus, in *Sandura Co.*, TRADE REG. REP., ¶ 16095 (Sept. 26, 1962), *appeal pending*, 6th Cir., ¶ 25901, the Commission absolutely prohibited the respondent from utilizing a franchise system as a method of doing business for two years.

[T]his proceeding has shown that respondent's franchise system is not a discrete mechanism but only a part of a more comprehensive distribution pattern. That distribution pattern is unlawfully restrictive, and, as the Commission's opinion explains [¶ 15945], the franchise system contributes to its anticompetitive effect. The Commission therefore considers this provision necessary in order to guarantee that respondent's distributors and dealers will not continue to believe that they are under the restraints that have been associated with the franchise system in the past.

¶ 16095 at 20915.

difference in this respect between the power of the Commission and that of a court of equity.<sup>70</sup> And, to the extent permitted by men and funds, the means are available to compel compliance with existing orders.<sup>71</sup> Fines may be and have been imposed totalling \$5,000 for each day of continued violation.<sup>72</sup>

There is both strength and weakness in the Commission's injunctive-like process. Final orders do not come quickly; a respondent is assured of both a hearing and an appeal. Yet a broad spectrum of power does exist, beginning with the garnering of facts and continuing through the forcing of compliance with final orders.

How may this power best be used to achieve the statutory goals set by the Congress? That is the threshold question, for Congress required of the Commission not merely the duty of publicizing, but of effecting those conditions conducive to competition. Publicity through the cease and desist procedure was but a single means of achieving the desired end. There remained the order itself.

Regarding the use of its injunctive-like powers under section 5, few strictures were placed upon the FTC either by the Congress or the courts. Indeed, the Federal Trade Commission Act imposed only one condition. It must "appear to the Commission that a proceeding by it . . . would be to the interest of the public."<sup>73</sup> Mr. Justice Brandeis, for the Supreme Court, said of this requirement:

In determining whether a proposed proceeding will be in the public interest the Commission exercises a broad discretion. But the mere fact that it is to the interest of the community that private rights shall be respected is not enough to support a finding of public interest. To justify filing a complaint the

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70. In *Federal Trade Comm'n v. National Lead Co.*, 352 U.S. 419 (1957), the Court said: "We need not discuss the full scope of the powers of the Federal Trade Commission, nor their relative breadth in comparison with those of a court of equity. As this Court said in *May Dept. Store Co. v. Labor Board*, 326 U.S. 376, 390 (1945), 'the test . . . is whether the Board might have reasonably concluded . . . that such an order was necessary. . . .'" *Federal Trade Comm'n v. National Lead Co.*, *supra* at 430 n.7.

71. 52 Stat. 116 (1914), 15 U.S.C. § 56 (1958). If an order is violated the FTC may "certify the facts to the Attorney General, whose duty it shall be to cause appropriate proceedings to be brought for the enforcement of the provisions of such sections or subsection."

72. Since the Compliance Division was established in May, 1947, until June, 1961, approximately 132 civil penalty suits were certified to the Attorney General. Penalties imposed by the courts totalled \$460,675.57. During fiscal 1961 five penalty suits were concluded; judgments in these cases brought fines of \$38,000. On June 30, 1961 there were pending 27 penalty suits. 1961 FTC ANN. REP. 56.

73. Federal Trade Commission Act, ch. 311, § 5, 38 Stat. 717 (1914) (amended by 52 Stat. 111 (1938), as amended, 15 U.S.C. § 45(b) (1958)).

public interest must be specific and substantial. Often it is so, because the unfair method employed threatens the existence of present or potential competition. Sometimes, because the unfair method is being employed under circumstances which involve flagrant oppression of the weak by the strong. Sometimes, because, although the aggregate of the loss entailed may be so serious and widespread as to make the matter one of public consequence, no private suit would be brought to stop the unfair conduct, since the loss to each of the individuals is too small to warrant it.<sup>74</sup>

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74. *Federal Trade Comm'n v. Klesner*, 280 U.S. 19, 28 (1929). The factual context for the Court's reasoning concerned an FTC complaint charging the respondent with "passing off" his store as that of another. The Court prefaced its statement by declaring:

Section 5 of the Federal Trade Commission Act does not provide private persons with an administrative remedy for private wrongs. The formal complaint is brought in the Commission's name; the prosecution is wholly that of the Government; and it bears the entire expense of the prosecution. A person who deems himself aggrieved by the use of an unfair method of competition is not given the right to institute before the Commission a complaint against the alleged wrongdoer. Nor may the Commission authorize him to do so. He may of course bring the matter to the Commission's attention and request it to file a complaint. But a denial of his request is final. And if the request is granted and a proceeding is instituted, he does not become a party to it or have any control over it.

The provisions in the Federal Trade Commission Act . . . concerning unfair competition are often compared with those of the Interstate Commerce Act . . . dealing with unjust discrimination. But in their bearing upon private rights, they are wholly dissimilar. The latter Act imposes upon the carrier many duties; and it creates in the individual corresponding rights. For the violation of the private right it affords a private administrative remedy. It empowers any interested person deeming himself aggrieved to file, as of right, a complaint before the Interstate Commerce Commission; and it requires the carrier to make answer. Moreover, the complainant there, as in civil judicial proceedings, bears the expense of prosecuting his claim. The Federal Trade Commission Act contains no such features.

While the Federal Trade Commission exercises under section 5 the functions of both prosecutor and judge, the scope of its authority is strictly limited. A complaint may be filed only "if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public." . . . Public interest may exist although the practice deemed unfair does not violate any private right. In *Federal Trade Comm'n v. Beech-Nut Packing Co.*, 257 U.S. 441 . . . a practice was suppressed as being against public policy, although no private right either of a trader or of a purchaser appears to have been invaded. In *Federal Trade Comm'n v. Winsted Hosiery Co.*, 258 U.S. 483 . . . an unfair practice was suppressed because it affected injuriously a substantial part of the purchasing public, although the method employed did not involve invasion of the private right of any trader competed against.

*Id.* at 525-28.

The Court concluded:

The alleged unfair competition here complained of arose out of a controversy essentially private in its nature. The practice was persisted in largely out of hatred and malice engendered by Sammons' act. It is not claimed that the article supplied by Klesner was inferior to that of Sammons, or that the

While this holding remains the law, its application has been limited, for the passing years have seen the courts narrow the scope of their review; the administrative agency has been given freer reign. Thus, in *Moretrench Corp. v. Federal Trade Comm'n*<sup>75</sup> an appellate court yielded to the Commission's expertise; the agency rather than the court, it was reasoned, was in a better position to determine the existence of public interest. Indeed, in *Northern Feather Works v. Federal Trade Comm'n*<sup>76</sup> the court said:

The suggestion is also made to us that public interest does not demand an order requiring accurate labeling. A quotation from a recent Supreme Court opinion gives one complete answer to this suggestion. Speaking for the Supreme Court, Mr. Justice Minton says in *American Airlines, Inc. v. North American Airlines, Inc.*, 1956, 76 S. Ct. 600, 604: "It should be noted at the outset that a finding as to the 'interest of the public' under both § 411 . . . and § 5 is not a prerequisite to the issuance of a cease and desist order as such. Rather, consideration of the public interest is made a condition upon the assumption of jurisdiction by the agency to investigate trade practices and

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public suffered otherwise financially by Klesner's use of the words "Shade Shop." It is significant that the complaint before the Commission was not filed until after the dismissal, in 1920, of a suit which had been brought by Sammons in 1915, in the Supreme Court of the District, to enjoin Klesner's use of the words "Shade Shop." When the Commission directed the filing of the complaint Hooper & Klesner had been using those words in its business for five years. They had been used for nearly seven years before the order here in question was made; and for nearly nine years before this suit to enforce it was begun. Whatever confusion had originally resulted from Klesner's use of the words must have been largely dissipated before the Commission first took action. If members of the public were in 1920, or later, seriously interested in the matter, it must have been because they had become partisans in the private controversy between Sammons and Klesner.

*Id.* at 28-29.

75. 127 F.2d 792 (2d Cir. 1942). Judge Learned Hand, speaking for the court said: One might perhaps infer that if the only interest at stake is that customers shall get goods from the seller of whom they supposed they are buying, it is not enough, provided the quality is as good as what they think they are receiving; but it seems clear from what the court has said later that this is not so. *Federal Trade Comm'n v. Royal Milling Co.*, 288 U.S. 212, 216, 217 . . . ; *Federal Trade Comm'n v. Algoma Lumber Co.*, 291 U.S. 67, 68. . . . In the last case Cardozo, J., went indeed so far as to say: "The public is entitled to get what it chooses, though the choice may be dictated by caprice or by fashion or perhaps by ignorance." It would seem, therefore, that *Federal Trade Comm'n v. Klesner* . . . is to be put down as deciding that the court may consider whether the controversy is not in general too trivial to justify the attention of the Commission.

*Id.* at 795.

76. 234 F.2d 335 (3d Cir. 1956).

methods of competition and determine whether or not they are unfair. . . ."<sup>77</sup>

With somewhat similar rationale the judiciary has afforded the FTC wide discretion as to how and against whom complaints and orders are issued. It matters not that all of a respondent's competitors are engaged in the same unfair practice. "In the absence of a patent abuse of discretion" agency orders must stand even though a respondent is placed at a competitive disadvantage.<sup>78</sup>

This is but recognition of the fact that in the shaping of its remedies within the framework of regulatory legislation, an agency is called upon to exercise its specialized, experienced judgment. Thus, the decision as to whether or not an order against one firm to cease and desist from engaging in illegal price discrimination should go into effect before others are similarly prohibited depends on a variety of factors peculiarly within the expert understanding of the Commission. Only the Commission, for example, is competent to make an initial determination as to whether and to what extent there is a relevant "industry" within which the particular respondent competes and whether or not the nature of that competition is such as to indicate identical treatment of the entire industry by an enforcement agency. Moreover, although an allegedly illegal practice may appear to be operative throughout an industry, whether such appearances reflect fact and whether all firms in the industry should be dealt with in a single proceeding or should receive individualized treatment are questions that call for discretionary determination by the administrative agency. . . . Furthermore, the Commission alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically.<sup>79</sup>

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77. *Id.* at 338.

78. *Moog Indus., Inc. v. Federal Trade Comm'n*, 355 U.S. 411, 414 (1958).

79. *Id.* at 413. See *National Candy Co. v. Federal Trade Comm'n*, 104 F.2d 999 (7th Cir. 1939):

Petitioner further urges that it would be prejudicially discriminatory against it to permit the order to become operative because its competitors use the same methods. In other words, it argues that unless the Government proceeds against all such offenders at one time it would be wrong to proceed against it alone. There is no merit in this contention. *Federal Trade Commission v. Winsted Hosiery Co.*, 258 U.S. 483; *Federal Trade Commission v. Keppel & Bro.*, 291 U.S. 304.



Latitude has been allowed the Commission. From the Congress came independence, and from the courts, freedom of action. It remained for the agency to draw its own lines, to define the public interest, and to create a program "to achieve the ends contemplated by Congress."

This the FTC has attempted. By rule, informal administrative treatment was denied in all investigations involving "alleged false advertising of food, drugs, devices or cosmetics which are inherently dangerous, the sale of fabrics and wearing apparel which are so highly flammable as to be dangerous, or the suppression or restraint of competition through conspiracy or discriminatory or monopolistic practices."<sup>80</sup> Once an unfair practice of the type described is discovered there can be no informal disposition of the matter; only the mandatory path lies open. The respondent at best may expeditiously dispose of the issue through the new streamlined consent procedure.<sup>81</sup> To the FTC public interest will allow no other answer.

Two Commissioners, however, have placed caveats on any broad reading of the Commission's rule. Where a respondent has shown a desire and an effort to abide by Commission mandate he ought not be proceeded against, said Commissioner Elman.<sup>82</sup> Apart from this critique Commissioner MacIntyre argued that complaints ought not be issued against minor members of an industry; challenge should be centered where it will be effective.<sup>83</sup> In sum, the two Commissioners have raised a plea for selectivity. Complaints should be brought only when they aid in total enforcement:

Whatever the scope of judicial review in this respect, it is the responsibility of the Commission, primarily and principally if not exclusively, to determine whether issuance of a complaint is in the public interest. This responsibility, confronting us as it does every day of the Commission's work-week, cannot be shirked in any spirit of good-natured accommodation or deference to institutional habits. If, as I believe, major change must be made in the criteria governing selection of cases on the

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*Id.* at 1004. See also *Butterick Co. v. Federal Trade Comm'n*, 4 F2d 910, 912 (2d Cir. 1925).

80. FTC R. PRAC., 16 C.F.R. § 1.42 (Supp. 1963).

81. FTC R. PRAC., 16 C.F.R. §§ 3.1-3.4 (Supp. 1963).

82. *Gimbel Bros.*, TRADE REG. REP. ¶ 15748, at 20568 (Feb. 23, 1962). It must be noted that the statute in question was the Fur Products Labelling Act and the Rules and Regulations promulgated thereunder. Nevertheless, Commissioner Elman's dissent seemed directed at all practices considered by the Commission.

83. *Sandura Co.*, TRADE REG. REP. ¶ 15945 (June 11, 1962). It was Commissioner MacIntyre who spoke for the majority in *Gimbel Bros.* and dissented in *Sandura*. Commissioner Elman delivered the majority opinion in *Sandura*.

Commission's docket, it is the Commission which must make it.<sup>84</sup>

The selectivity urged by Commissioners Elman and MacIntyre generally can be of two kinds. (1) The FTC might exercise greater discretion over the subject matter or practices against which it will proceed. Conceivably it could limit itself, aside from Clayton Act and anti-deceptive enforcement, to incipient monopolistic practices. Thus, for example, where the Justice Department is willing to prosecute, what purpose is served by an FTC complaint in a section 2 Sherman Act matter, though it must be admitted that uttering "incipient monopoly" is somewhat easier than identifying the economic practices comprehended therein. Meaningful relief is more readily available to the Justice Department in a court of equity.<sup>85</sup> (2) Because the FTC is interested in compliance, and not cases as such, there ought to be a continued examination of those selected as parties respondent. Yet, here a problem arises which Chairman Dixon recently described:

I can go out and talk like an evangelist and a preacher and persuade them [business] all to live up to the ethical code and the law, and that is all the law is, but if you persuade 98 out of 100, the failure to persuade the other 2 would work a hardship on the 98 unless you get that other 2 quick, and if it takes 2 or 3 years to get them, dog-gone it, they force their way back on the ethical ones.<sup>86</sup>

Like Gresham's law the unfair acts of a few, if sustained, force the majority to the same level. Seldom do practices remain isolated; compe-

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84. *Gimbel Bros.*, TRADE REG. REP. ¶ 15748 at 20570 (Feb. 23, 1962). "Individual members of the Commission cannot publicly announce the fact of, and reasons for, dissent when particular complaints are issued. Hence I have thought it appropriate to express here my reasons for believing that this is not the kind of case in which the public interest is served by issuance of a complaint." *Ibid.*

85. It may well be, however, that the Commission possesses the powers of a court of equity in terms of any order entered. See *Federal Trade Comm'n v. National Lead Co.*, 352 U.S. 419 (1957). On the other hand, the procedure in a Justice Department proceeding seems simpler than that of the FTC. Apparently, only three stages must be passed through in a Justice Department civil matter: the trial court, the appellate tribunal, and the Supreme Court. The FTC first assigns the matter to the Hearing Examiner with review by the Commission—if the issues are deemed significant; there follows another review by an appellate court, and finally, if certiorari is granted, review by the Supreme Court. See LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT ELECT 51 (1960); cf. Rockefeller, *Antitrust Enforcement: Duopoly or Monopoly*, 1962 WIS. L. REV. 437, 445-46. But obviously, cases brought by both the Justice Department and the Commission are subject to substantial delay because of their inherent complexity.

86. *Hearings on H.R. 12711 before the Subcommittee of the Senate Appropriations Committee*, 87th Cong., 2d Sess. 978 (1962).

tition will not allow it. Businessmen react to each other in their bid for profit. This, perhaps, Congress did not fully appreciate in 1914. The dynamics of trade cannot await a cease and desist order with the attendant publicity. By that time not only the respondent but the entire industry might well be involved in the same challenged method of competition.

Gradual pragmatic innovation has been the Commission's response to the challenge of industrywide violations.

For example, the Commission, through the use of authority provided in section 6 of its act, obtained information indicating that a substantial number of suppliers of wearing apparel to large department stores may be violating section 2 of the Clayton Act by granting discriminatory allowances. Rather than proceed against the firms on an individual basis and thus create competitive inequities, the Commission is affording all of these suppliers the opportunity to agree to an order to cease and desist.<sup>87</sup>

A brief narration of the facts of the apparel industry project indicates both the hope and despair of massive enforcement: Section 6 questionnaires were sent to 310 selected apparel manufacturers. Based upon the returns, there was evidence that 80%, or 248 concerns were offering discriminatory advertising allowances in violation of the Robinson-Patman Act.<sup>88</sup> In the spring of 1962 the Commission sent proposed complaints and consent orders to 140 of those investigated,<sup>89</sup> but within a brief period extended indefinitely the time for signing.<sup>90</sup> Approximately four months later the FTC granted an industry request for a conference designed to air the practices attacked in the Commission's proposed complaints.<sup>91</sup> From the conference came an understanding of the nature of the apparel industry. Unlike other producing units in our economy, the members of this trade were small independent businessmen numbering approximately 34,500.

The hearing was held October 17, 1962. With Commissioners Elman and Higgenbotham dissenting, all 248 manufacturers were sent proposed complaints and orders in January with a time limit for signing placed on them. They were given until February 15, 1963 to consent, with the effective date set at July 1, 1963. Those notified in the spring of 1962 were reminded of the Commission's belief that they were in vio-

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87. *Id.* at 956.

88. BNA ANTITRUST & TRADE REG. REP., p. A-1 (Jan. 8, 1963).

89. BNA ANTITRUST & TRADE REG. REP., p. A-2 (June 19, 1962).

90. BNA ANTITRUST & TRADE REG. REP., p. A-18 (June 26, 1962).

91. BNA ANTITRUST & TRADE REG. REP., p. A-2 (Oct. 23, 1962).

lation of the Robinson-Patman Act. Those written in January were told that a "large number of wearing apparel companies, investigated in a similar manner, have indicated a desire to dispose of the matter by consent settlement." For the two dissenting Commissioners, however, the project posed "serious and difficult" problems of enforcement. More than 248 businesses were involved; there existed 34,500 manufacturers. The number of violators could "run into thousands."<sup>91</sup>

By February 15, a total of 153 concerns had signed the consent orders.<sup>92</sup> Said Chairman Dixon: "The response to Commission efforts indicates an industry desire to assume fair competitive practices. The remaining group of alleged violators is small enough that we can move against them in a hurry. We have increased the number of personnel assigned to these cases and directed that the cases be assigned priority."<sup>93</sup>

Yet, even as to this single project the burden placed upon the litigating bureau is great. According to the chairman's statement, ninety-five dockets are scheduled for hearing. Further, if equal treatment is to be accorded those who already consented, the final orders must be entered by July 1 (although the Commission in its discretion might once more change the effective date). To grasp the difficulty of the assigned task consider these statistics: A *total* of 120 antimonopoly complaints was issued in fiscal 1961, and a *total* of 103 orders to cease and desist.<sup>94</sup>

Complaints issued during fiscal 1961 under . . . [the Robinson-Patman Act] represented approximately five-sixths of all of the antimonopoly proceedings instituted during the year; and the orders to cease and desist from Robinson-Patman violations represented an even larger proportion of all of the antimonopoly orders issued during the year. The great majority of all proceedings involving the Robinson-Patman Act were disposed of by consent orders.<sup>95</sup>

Nevertheless, with more men, completed investigations, and priority of assignment the announced goal might be met. And, if the assumption of the majority of the Commission is correct, namely, that the 248 respondents are the leaders, the pace-setters for the trade, industrywide compliance might be achieved even though similar action is not taken against the remaining thousands of manufacturers.

Though the apparel project is not the first of the Commission's industrywide efforts, compare the approach taken therein with the scheme

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92. BNA ANTITRUST & TRADE REG. REP., p. A-2 (Jan. 8, 1963).

93. BNA ANTITRUST & TRADE REG. REP., p. A-17 (Feb. 26, 1963).

94. 1961 FTC ANN. REP. 34.

95. *Id.* at 36.

of enforcement envisioned by the Congress. Publicity in itself was not enough; the FTC was given the power to compel obedience. The open hearing upon a complaint, with the subsequent dissemination of the agency's findings and order were the techniques of publicity. But, above all, there would be the order, a sanction with meaning. The congressionally designed mechanism could work well where all save a few competitors did not indulge in a questioned practice. It was another story where the practice was rampant. For the object was not solely to condemn a method of competition, but to cause all to accept that which was deemed unfair, to restore the conditions of free and fair competition.

Basically, the Congress left the Commission only the tool of discretion to resolve the issue of industrywide usage. Because the FTC is independent and an administrative agency it could initiate complaints of its own choosing; and, it could resolve issues informally. With the apparel industry the Commission exercised that discretion. Using the power to demand special reports, information was obtained from selected manufacturers tending to show violation of the Robinson-Patman Act. Consent orders were solicited, and a conference held. Again, compliance was sought. Only then did the FTC begin the process that will result in hearings. An effort indeed has been made to bring about the result intended by Congress.<sup>96</sup>

To Commissioners Elman and Higginbotham, however, the project would have stood a better chance of success if greater use had been made of the agency's informal procedures. Specifically, they recommended a six-point plan:

- (1) publicly set a target date—July 1 will do—for simultaneous and uniform discontinuance of the illegal advertising allowance; (2) make the Commission's advisory-opinion procedure available to any manufacturer who wants to submit a new advertising-allowance plan for approval; (3) specifically make the advisory-opinion procedure available to the 248 manufac-

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96. Other project-type investigations now underway involve substantial numbers of suppliers to chain food stores, manufacturers and distributors of prescription drugs and drug products, vendors of antibiotics used in the treatment of mastitis in cattle, vendors of medicinal preparations offered for the relief or treatment of hemorrhoids, advertisers of products offered for the prevention, relief and treatment of coughs and colds, sellers of reducing devices, advertisers making survey-type representations, sellers of food plans, and others. Other project-type proceedings are in the planning stage.

Letter from Chairman Dixon to Senator Magnuson, Subcommittee Chairman in Charge of Independent Appropriation, Aug. 3, 1962, reprinted in *Hearings on H.R. 12711 before the Subcommittee of the Senate Appropriations Committee*, 87th Cong., 2d Sess. 956 (1962).

turers to whom the Commission has mailed complaints and orders and give them a chance to obtain the Commission's advice before they are compelled to decide whether to accept a consent order; (4) supply every requested advisory opinion before the July 1 deadline; (5) make all consent orders identical in terms, applicable only to the specific practice, and effective on the target date; and (6) announce that any manufacturer or retailer who fails to come into line by the target date will be proceeded against, with no right to sign a consent order.<sup>97</sup>

The dissenting Commissioners differed from the majority only in degree. All agreed as to the substantive seriousness of the problem; their difference centered around techniques to be employed in effectuating the solution. Perhaps it was the Commission's self-imposed rule of procedure prohibiting the informal disposition of antitrust matters which accounted for the hesitancy of the majority,<sup>98</sup> and produced their greater emphasis on the mandatory processes. When the subject is restraint of trade, they might reason, flexibility must yield to stricter measures. Speaking in 1960, then Commissioner Tait clarified the limitations facing the FTC:

In our processing of cases one factor—public interest—is at all times paramount. Although it is highly desirable that competitors be treated alike, the lodestar is the protection of the public interest. Where one dovetails with the other we can use shortened, flexible procedures to avoid competitive advantage or disadvantage. Wrong once found must be righted.<sup>99</sup>

If this can be accomplished quickly and effectively on a broad basis, the agency will acquiesce, implied Commissioner Tait. If, on the other hand, difficulty and delay will attend any massive enforcement plan, then the Commission should respond on an individual basis, regardless of competitive hardship. Subject to these standards Commissioner Tait drew upon several examples of industrywide action:

The Commission issued complaints against the Bulova Watch Company, Inc. (D. 5830), the Gruen Watch Company (D. 5836), and the Elgin National Watch Company (D. 5837),

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97. BNA ANTITRUST & TRADE REG. REP., p. A-2 (Jan. 8, 1963). The advisory opinion procedure will be described later in this section.

98. FTC R. PRAC., 16 C.F.R. § 1.42 (Supp. 1963).

99. Remarks by Commissioner Tait, "Equitable Treatment of Competitors," before the Section of Antitrust Law, New York State Bar Association, New York, N.Y., Jan. 28, 1960, p. 3.

charging each of them with granting advertising allowances to customers on disproportional terms in violation of Section 2(d) of the amended Clayton Act. It is a probability of business life that if sellers are competing for the business of preferred buyers by granting them disproportional advertising allowances and that if one of the sellers is required to discontinue the practice first, then he will lose business.

Counsel for one of the respondents in the watch cases readily agreed that a cease and desist order could be issued against his client provided that such an order was simultaneously issued against the other two respondents. Subsequently, counsel for the two remaining respondents made similar proposals. The result was that orders were issued at the same time against the three competitors. In effect, the Commission determined . . . that the public interest would be well protected by such agreements. Most certainly there was no delay in obtaining ultimate compliance with the law. In fact, compliance in all three cases was hastened. In addition, competitive advantages, or disadvantages, was eliminated. And it is readily apparent that the taxpayers' and respondents' money was conserved.<sup>100</sup>

Yet, not always has the Commission abstained from primary reliance on the informal procedures. Indeed, voluntary compliance has been used even in the face of the edict denying administrative treatment in all investigations "involving alleged false advertising of food, drugs, devices or cosmetics which are inherently dangerous . . . or the suppression . . . of competition. . . ."<sup>101</sup> Thus, in 1955 the Commission promulgated Cigarette Advertising Guides<sup>102</sup> designed for the use of its staff, and released to the public in the interest of obtaining voluntary, simultaneous and prompt cooperation by those affected. Written in relatively simple language the Guides stated a view of the law. More important, though, the voluntary arm of the Commission endeavored to persuade compliance. "In the most important achievement under this program the

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100. *Id.* at 4.

101. FTC R. PRAC. 16 C.F.R. § 1.42 (Supp. 1963).

102. Some may argue that cigarettes do not fall within the scope of the rule, for they are not "inherently dangerous." The argument, however, is balanced by the Third Circuit's decision in *Pritchard v. Liggett & Myers Tobacco Co.*, 295 F.2d 292 (3d Cir. 1961). One who had contracted lung cancer, it was held, may well have relied on the express assurances of the seller that the smoking of his cigarettes would have no harmful effects. An earlier attempt by the FTC to classify cigarettes as a drug failed. See *FTC v. Liggett & Myers Tobacco Co.*, 203 F.2d 955 (2d Cir. 1953).

seven major manufacturers agreed to delete all tar and nicotine claims from cigarette advertising—a noteworthy example of industry-government cooperation to eliminate a practice considered deceptive and confusing to the public.”<sup>103</sup> Backed by the mandatory power of the Commission the voluntary spokesmen stated their positions: the tar and nicotine claims were related directly to health representations. Factually, there was no significant difference in the tar and nicotine content of most cigarettes. To advertise otherwise was violative of the Guides.<sup>104</sup>

More Guides followed the initial venture.<sup>105</sup> With them came administration, enforcement and interpretation.<sup>106</sup> To illustrate, furniture dealers in the District of Columbia were invited to a meeting where comparative pricing claims were discussed. Following a rigorous question and answer period, the FTC “then solicited voluntary agreements to comply with the Guides [Against Deceptive Pricing].” It was then said: “The results of this meeting have been such that we [the FTC’s Bureau of Consultation] are now considering plans for continued use of the same procedure in the District of Columbia and other areas of the

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103. 1960 FTC ANN. REP. 82.

104. The primary support for the Commission’s position sprang from *P. Lorillard Co. v. Federal Trade Comm’n*, 186 F.2d 52 (4th Cir. 1950); see also, Baum, *Truthful Disparagement Under the Federal Trade Commission Act*, 51 TRADEMARK REP. 1081, 1090 (1961).

105. Guides Against Deceptive Pricing, TRADE REG. REP. ¶ 7897 (1958); Tire Advertising Guides, TRADE REG. REP. ¶ 7899 (1958); Guides Against Bait Advertising, TRADE REG. REP. ¶ 7893 (1959); Guides Against Deceptive Advertising of Guarantees, TRADE REG. REP. ¶ 7895 (1960).

106. The momentum of the Guide program can best be described by comparing fiscal 1959 with that of fiscal 1960. In 1959:

[A]bandonment or correction of misleading or deceptive claims was obtained in 51 matters under the Guides, and 48 under the Pricing Guides. The files were closed on assurances of compliance and the submission of revised advertising.

Advice and guidance on compliance with guides was given to 68 firms and business groups in or related to the tire industry, and in 138 matters involving price representations.

1959 FTC ANN. REP. 71.

Consider now fiscal 1960. *Cigarette Advertising Guides*: “During the year, administration of these Guides was responsible for eliminating some 62 questionable claims involving 30 different brands of cigarettes.” 1960 FTC ANN. REP. 82. *Tire Advertising Guides*: “50 . . . [matters] were closed upon receipt of adequate assurances of discontinuance and revised advertising.” *Ibid.* *Guides Against Deceptive Pricing*: “Abandonment or correction . . . was obtained in 117 matters under these Guides and the files were closed upon receipt of revised advertising.” *Id.* at 83.

Enforcement was permitted in all save the Guides for Advertising Allowances and Other Merchandising Payments and Services (1960). These Guides, interpreting §§ 2(d) and (e) of the Robinson-Patman Act, represented the first application of the Guide concept to the antimonopoly field. “Distribution of these Guides has been handled by the [voluntary compliance] Bureau, which has also been responsible for handling the interpretive work generated by them. In the 6 weeks following their issuance, we have distributed 35,528 copies in response to 1,248 requests.” *Id.* at 84.



country which appear to offer similar opportunities for success.”<sup>107</sup>

The vitality behind the Guide program was short-lived. The past few years have seen the function of informal enforcement—characterized by areawide and industry meetings coupled with persistent mail inquiries—shorn from the Guide unit.<sup>108</sup> Designated to promulgate and interpret understandable guides this once autonomous unit within the Bureau Director’s office now has been made a part of the Trade Practice Conference Division.<sup>109</sup>

Nevertheless, something remains of value from the Guide concept. The statements designed for the layman as well as the lawyer are ways of publicizing Commission opinion, of synthesizing existing law. Further, the Guides can serve as a medium for the formulation of understandable standards binding upon all:

When viewed as a compilation and summary of the expertise acquired by the Commission from having repeatedly decided cases dealing with identical false claims, the role of the “*Guides*” becomes apparent. They serve to inform the public and the bar of the interpretation which the Commission, unaided by further consumer testimony or other evidence, will place upon advertisements using the word and phrases therein set out. *It is our view that words and phrases of the type set out in the “Guides” must be consistently dealt with by the Commission or its decisions will have no meaning or value.* Only by consistent interpretation can some order be brought to the semantic jungle of advertising.<sup>110</sup>

From the innovation of Guides has come further experimentation. Trade Regulation Rules, may provide an additional means for the Com-

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107. *Id.* at 82.

108. Though fiscal 1961 saw an even more dramatic increase in the number of compliance matters handled, enforcement evidently is not to be a function under the program. 1961 FTC ANN. REP. 67.

109. BNA ANTITRUST & TRADE REG. REP., p. A-11 (Dec. 4, 1962). No public announcement concerning the reasons for the change attended the decision. Some have speculated that the advisory opinion unit already had a full burden of work. (It should be noted that as a part of the recent Commission reorganization the Guide program received recognition by being formed into a separate division which later assumed the task of administering advisory opinions.)

110. Gimbel Bros., Inc., TRADE REG. REP. ¶ 16020, at 20858-59. (Emphasis added.) The “*Guides*” were promulgated after lengthy and detailed study of all pertinent decided cases and are the end product of continuous official observation of advertising practices and consumer reaction from the founding of the Commission to the date of publication. As we stated in *Arnold Constable Corporation* (Dkt. 7657, June 12, 1961), they are not substantive law in and of themselves, but this does not mean that they may be completely ignored and rejected. . . . *Id.* at 20858.

mission to inform itself of current practices and also to announce formally its policy concerning their legality. Potentially, the Rules Division,<sup>111</sup> established within the voluntary compliance bureau,<sup>112</sup> affords one means for the individual Commissioners to acquire that measure of expertise with which the judiciary assumes they are endowed.<sup>113</sup>

Rules promulgated under the new trade regulation rule procedure will identify practices which the FTC, based upon its factual knowledge, deems unlawful. They can be tailored to the appropriate circumstances—some may cover all applications of a particular statutory provision and others may be nation-wide in effect or limited to particular areas or industries or to particular products or geographic markets. . . . They may be relied upon by the FTC in any adjudicative proceeding brought against a violator, provided that the respondent has been given a fair hearing on the legality and propriety of applying the rule to the particular case.<sup>114</sup>

After more than nine months following the establishment of the new division the first pilot projects were announced.<sup>115</sup> Scheduled are two hearings designed "to formulate proper rules regarding industrywide use of the word 'automatic' for describing sewing machines and the use of certain size dimensions for sleeping bags."<sup>116</sup> Though applications for

111. The formal name given to the new unit is the Division of General Rules and Regulations Applicable to Unlawful Trade Practices.

112. The voluntary compliance bureau once possessing the title, "Bureau of Consultation," has been renamed, "Bureau of Industry Guidance."

113. [T]he commission does more than decide cases. It has the duty to feel continually the pulse of trade—to understand conditions in industry. It has the obligation to get the facts quickly, constantly, so that it may act in accordance with a plan. It recognizes that expertise does not arise merely from occupying a chair, either as a Commissioner or a staff attorney, but must be earned. Address by Chairman Dixon, "The Federal Trade Commission in 1961," to the Section on Antitrust Law of the New York State Bar Association, New York, N.Y., Jan. 25, 1962, p. 4.

114. FTC News Release, Washington, D.C., May 15, 1962. The procedure for the promulgation of trade regulation rules is much like that utilized by agencies for informal rule making under § 4(b) of the Administrative Procedure Act, ch. 324, 60 Stat. 238 (1946), 5 U.S.C. § 1003 (1958). See FTC R. PRAC., 16 CFR §§ 1.61-71 (Supp. 1963). Chairman Dixon said, however, "Such a rule would not be a law in any sense. A violator of it would always have the right to argue that the rule does not correctly reflect the law or that his own practice does not violate the rule." Address by Chairman Dixon, "Let's Get Rid of Uncertainty," before the American Association of Advertising Agencies, April 28, 1962, at 11. Cf. Address of Commissioner MacIntyre, "Measures for Preserving Competition," before the National Congress of Petroleum Retailers, Inc., Aug. 22, 1962.

115. Remarks by Commissioner MacIntyre, "Report on the Federal Trade Commission," before the Annual Meeting of the National Account Managers Association, New York, N.Y., March 13, 1963, at 8.

116. *Ibid.*

trade regulation proceedings were received from "a number of industries," these were the projects decided upon by the Commission. There are some who would conclude that the FTC's choice springs from a desire "to start modestly with a limited rule applicable to a specific situation" rather than the promulgation of "an organized, comprehensive set of rules covering one whole area of law."<sup>117</sup>

Still, no matter what the starting point the goal—meaningful interpretations binding upon the Commission<sup>118</sup>—remains the same. The question is whether the Trade Regulation Division has the wherewithal to accomplish the end. Consider the ingredients of a Rule: (1) It is not enough that the project, which is selected from applications, is feasible (*i.e.*, lends itself to formulation of a Rule); it must also foster the Commission's overall enforcement program. (2) For, unless the FTC ignores the intent of the Congress, publicity through the mere creation of the Rule is not enough. Compliance must be coupled with publicity. This means that the mandatory arm will be called upon to insure that the Rule is obeyed. Men, not only at the trial level, but also at the appellate level in the Commission, will give of their time to see the project through to completion. The decision starting the apparatus leading to a Rule has many ramifications that affect the entire agency. Thus, if the Trade Regulation Division is to have a meaningful existence, there must be a close working relationship with the litigation and appellate units. More, there must be an understanding of the elements which make a Rule workable and enforceable, for the business community and the Commission.

All this is the task of a Division within the Bureau of Industry Guidance which for the fiscal year 1962 had a total staff of twenty attorneys.<sup>119</sup> Further, the Bureau itself is charged with three additional functions aside from trade regulation rules, namely, advisory opinions, Guides, and trade practice conferences. Are there men enough, with experience enough, to do the job? One somewhat hopeful sign is the increased budget allocation for the Bureau in fiscal 1963 which provided

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117. BNA ANTITRUST & TRADE REG. REP., p. B-4 (Dec. 25, 1962).

118. One leading member of the antitrust Bar has written:

Recently, however, it [the Commission] has courageously decided to experiment with the issuance of Regulations which apparently are to be relied upon by the Commission [until formally rescinded after rule-making proceeding comparable to those used in formulating the Regulations]—although a respondent will be permitted to challenge such a Regulation on stated grounds. In this manner the Commission has sought to supplement its offer of authoritative advice on potential individual transactions with a tender of equally reliable advice on present industry-wide practices.

Van Cise, "How to Live With Antitrust," HARV. BUS. REV., Dec., 1962, 119, at 123.

119. Letter from Bryan H. Jacques, Director of the Bureau of Industry Guidance, to the *Indiana Law Journal*, Dec. 10, 1962.

"for 47 positions in the Bureau . . . including attorney, administrative and clerical personnel."<sup>120</sup>

The potential of this new Division is limited only by the quantity and quality of its personnel and the freedom it is granted by the Commission. View the past, by way of illustration, to understand how trade regulation rules could have been applied in the antimonopoly field. Take the single question under the Robinson-Patman Act of whether the meeting competition defense is available to an oil company which grants a discriminatory allowance to an independent-lessee dealer enmeshed in a price war.<sup>121</sup> The Commission reacted to the problem by instituting multiple complaints against numerous oil companies.<sup>122</sup> One Commissioner pointed out his difficulty understanding why complaints were later brought against some and not others participating in the same price war.<sup>123</sup> More, once the complaints issued, a great deal of the trial staff's time and the FTC's monies were consumed in bringing the matter

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120. *Ibid.* See also Hearings on H.R. 12711 before the Subcommittee of the Senate Appropriation Committee, 87th Cong., 2d Sess., at 957 (1962).

121. The Supreme Court framed the issue in this manner:  
The question presented is whether a refiner-supplier of gasoline charged with the granting of a price discrimination in violation of § 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, has available to it, under § 2(b) of the Act, the defense that the discriminatory lower price was given "in good faith to meet an equally low price of a competitor," when the gasoline refiner-supplier shows that it gave the discriminatory price to only one of a number of its independently owned retail station customers in a particular region in order to enable that station to meet price reductions of a competing service station owned and operated by a retail chain selling a different brand of gasoline. *FTC v. Sun Oil Co.*, TRADE REG. REP. (1963), ¶ 70620, at 77532 (U.S. Sup. Ct. Jan. 14, 1963).

122. In addition to the *Sun Oil* case, the Commission issued complaints against the following: *American Oil Co.*, TRADE REG. REP., ¶ 15961 (June 27, 1962) (Commission decision); *Pure Oil Co.*, TRADE REG. REP. ¶ 16111 (Sept. 28, 1962) (initial decision); *Texas Co.*, TRADE REG. REP. ¶ 16207 (Dec. 1, 1962) (initial decision).

123. Commissioner Elman, dissenting in *American Oil Co.*, *supra* note 122, said:

Finally . . . if the illegality of the prices met by respondent were so apparent, why is it that the Commission did not simultaneously bring price discrimination charges against all of its competitors who were equally involved in the Smyrna price war? The Commission obviously knew of these "unlawful" price reductions by respondent's competitors before this complaint was issued. It seems to be inequitable and not in the public interest to have proceeded against respondent alone. The order here operates as a broad, floating, punitive restraint on respondent's pricing activities in every market in the United States in which it engages in business in competition with other sellers. But respondent alone is now being subjected to such order, drastically limiting its ability to compete effectively. It seems fair to ask: Has the Commission's action here really promoted the "competition" which the Robinson-Patman Act was intended to protect and encourage?

*Id.* at 20796.

Soon after the *American Oil* opinion the Commission issued a complaint against the alleged instigator of the "war." *Shell Oil Co.*, TRADE REG. REP. ¶ 16132 (Oct. 16, 1962).

to final determination.<sup>124</sup> Was there not a simpler, more effective, and, indeed, more just way to accomplish the same end?

If the Commission felt that the issue as a matter of law absolutely prohibited the company from meeting the competition of its retail dealers in all circumstances, it could have so stated through such a device as trade regulation rules.<sup>125</sup> If, however, the Commission believed that certain exceptions must be worked into the broad prohibition, as the Supreme Court since has implied,<sup>126</sup> this, too, could have been done by trade regulation rules. The industry would have known in advance the agency's position and what was required of them. Instead of dealing with a series of individual cases the Commission could have attempted to treat an industry problem on an industrywide basis.<sup>127</sup>

Trade regulation rules or Guides are not the sole informal media for the announcement of Commission opinion. There remains the recently established machinery of the advisory opinion,<sup>128</sup> referred to by Commissioners Elman and Higginbotham dissenting in the apparel industry project.<sup>129</sup> Chairman Dixon explained the scope and significance of advisory opinions:

Heretofore, FTC staff members have been giving informal opinions not binding on the Commission. (Now) the Commission itself will, where practicable, advise if the proposed

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124. The *Sun Oil* case has been ruled upon by a hearing examiner, the Commission, a Court of Appeals, and the Supreme Court. Yet, only a narrow question has been resolved. "[I]f it appeared either that Super Test were an integrated supplier-retailer, or that it had received a price cut from its own supplier—presumably a competitor of Sun—we would be presented with a different case, *as to which we herein neither express nor intimate any opinion.*" *Sun Oil Co.*, TRADE REG. REP. (1963 Trade Cas.) ¶ 70620 n.7 at 77534 (U.S. Sup. Ct. Jan. 14, 1963). (Emphasis added.)

A court decides only the facts before it and no more. A commission, on the other hand, has the opportunity to lay down guides; it does not suffer the same inhibitions as a court. See *Colgate-Palmolive Co.*, TRADE REG. REP. ¶ 15643 (Dec. 29, 1961) where the Commission endeavored to set such guides in an adjudicated case. An example of how guidance or rules can be set down may be gleaned from a study of *Walton Mfg. Co.*, 126 N.L.R.B. 697 (1960), *enforced*, 289 F.2d 177 (5th Cir. 1961).

125. See FTC R. PRAC. 16 C.F.R. §§ 1.61-71 (Supp. 1963).

126. See note 124, *supra*.

127. Commissioner Elman offered still another avenue for resolving industrywide problems, the oft-forgotten petition for declaratory order embodied in § 5(d) of the Administrative Procedure Act. Of this device he said:

Declaratory orders might well be issued (1) where the principle being laid down is a novel one, and it would be unfair to make it applicable *ex post facto* and (2) where, although a cease and desist order against the particular respondent would serve no practical purpose, a declaration of the applicable principle would be generally useful in furnishing guidance to businessmen and their lawyers.

BNA ANTITRUST & TRADE REG. REP., p. A-6 (Oct. 16, 1962).

128. FTC R. PRAC., 16 C.F.R. §§ 1.91-93 (Supp. 1963).

129. See note 97 *supra*.

undertaking would be likely to result in further action. This advice may be revoked later if required by the public interest. However, the information submitted will not be used as a basis for a proceeding against the requesting party without prior notice and an opportunity for the party to discontinue the activity pursued in good faith in reliance upon the Commission's advice.<sup>130</sup>

Unlike trade regulation rules the Commission's advisory opinion is meaningful only as between the parties;<sup>131</sup> it is not published, nor may it be relied upon by the litigating bureaus or the hearing examiners. In sum, the advisory opinion serves the function of offering advice, but unlike trade regulation rules it does not have the additional characteristic of aiding in enforcement.

Yet, advisory opinions have had far greater use than trade regulation rules. During fiscal 1962 a total of 107 requests for rulings were received,<sup>132</sup> and as of November, 1962, opinions were issued in 14 matters.<sup>133</sup> Chairman Dixon predicted an ever-increasing number of applications; businessmen would be given the guidance they desire—at the Commission level.<sup>134</sup>

Though the goal of guidance is desirable Commissioner Anderson raised a warning flag.<sup>135</sup> It is the Commission under the Rules of Practice which must approve each opinion; it is the same Commission which must decide cases, and more importantly formulate an enforcement policy. Is there not a danger of inundation? Will the advisory opinions become so numerous that a Commissioner may not be able to properly perform his statutory duties?<sup>136</sup>

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130. FTC Press Release, Washington, D.C., May 15, 1962, at 2.

131. Commissioner Elman, it is interesting to note, did not concur in the establishment of the advisory opinion machinery. He said of the new procedure: "[It is] administratively unrealistic and impracticable, holding out to businessmen a promise to the ear that would probably be broken in the hope." *Ibid.*

132. Letter from Bryan H. Jacques, Director of the Bureau of Industry Guidance, to the *Indiana Law Journal*, Dec. 10, 1962.

133. BNA ANTITRUST & TRADE REG. REP., p. A-18 (Nov. 20, 1962).

134. Indeed, the Chairman indicated that with few exceptions (such as complex scientific questions) requests for advisory opinions would not be denied. More, the issuance of the opinion might only be the beginning of the matter, particularly where an unfavorable ruling is forthcoming; the applicant may return with a revised plan. See Hearings on H.R. 12711 before the Subcommittee of the Senate Appropriations Committee, 87th Cong., 2d Sess., at 965.

135. BNA ANTITRUST & TRADE REG. REP., p. A-18 (Nov. 20, 1962).

136. It would be a fair guess that during fiscal 1962 no more than six attorneys were charged with handling requests for advisory opinions at staff level. As the number of requests increase, with a small staff there obviously is a danger of loss of quality, and precisely for that reason, a need for more stringent review.

This then has been the direction of the Commission in the development of informal procedures: The brief experiment in informal enforcement through guides has ended; the emphasis has shifted to interpretation, which except for advisory opinions, is designed to be of direct assistance to the litigation bureaus. Guides cannot be ignored by hearing examiners, and trade regulation rules stand as formal announcements of Commission policy.

Industrywide compliance may be an ideal, but the formal mechanism of the cease and desist order is the tool that in the final analysis always must be used—so the rationale seems. Yet, against this conclusion one must weigh the recent address of Commissioner MacIntyre, who sparked the move for trade regulation rules:

I do believe that there is room for us to move forward and make considerable progress in our effort to persuade businessmen into voluntary compliance with the law without doing violence to policies the Commission has adhered to heretofore. I say that because it is my firm belief that we can make changes in our policy and procedures which will provide a greater opportunity for us to persuade businessmen into voluntary compliance with the law *before we are compelled to investigate and litigate cases against them.*

These thoughts prompt me to say that I shall urge the Commission to adopt a procedure along these lines designed to promote more effectively voluntary compliance with the law. For the purpose of identification at this time I would describe this suggested procedure as a "*Pre-Investigation Conference*" . . . [I]f the Federal Trade Commission should approve and put into effect a procedure such as I suggest, business and the public will benefit. It could make the real beginning of an effective partnership of government and business in developing a program for voluntary compliance with the law. The end point result would be a greater degree of fairness and far more effectiveness flowing from the application of our Federal Regulatory Laws.<sup>137</sup>

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137. Remarks by Commissioner MacIntyre, "Report on the Federal Trade Commission," before the Annual Meeting of the National Account Managers Association, New York, N.Y., March 13, 1963, pp. 14-15. Commissioner MacIntyre prefaced this statement saying:

It is argued that under the present administration of the law little support is given to those who are trying to live under it. Also, it is argued that unless some supplementary procedure is devised for voluntary compliance with the law, businessmen inevitably will be treated inequitably. The point of that argu-

## IV. PROBLEMS AND SOLUTIONS

Industry or areawide compliance is a lure both to Government and business. It offers the ends of effective and fair enforcement. Yet, for the same reasons problems are presented. Litigation of individual cases before the Commission and the courts results in a determination, a statement of the law at a particular time applied to a specified set of facts. Voluntary compliance, however, is an attempt to resolve an issue based upon what the Commission assumes both the law and the facts to be. Herein lies a danger, which one critic has dramatized, perhaps too emphatically, by pointing to FTC enforcement of the Robinson-Patman Act:

Confronted by restrictive FTC interpretations, and averse to costly "test-casing" in the courts, cautious firms may forego bold and aggressive maneuvers in favor of the safe and the conservative pricing routine.

At its worst, such a regulatory atmosphere nurtures a cartel mentality which saps the drive of vigorous competition. Competitive pricing is curbed to pacify the FTC. Once businessmen are conditioned to key their own prices to the agency's controls, a next and natural step is to ensure that rivals are also under wraps—via "industry-wide" Robinson-Patman enforcement or concerted pledges of allegiance to the FTC. Price competition in the "free" sector of the economy can become creeping cartelism under a latter day NRA.<sup>138</sup>

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ment is that when we proceed by way of litigation against one, six, eight or ten firms for the use of a widespread discriminatory pricing practice in an industry, prolonged litigation ensues. Perhaps, some cases will be concluded promptly. Others will drag along for many years. The result is that some business firms are put under sanctions and prohibited from using a practice that competitors will be permitted to continue until the prolonged litigation is concluded. It is argued that this inequity can be avoided and in many instances would be avoided if all these businessmen were afforded the opportunity to voluntarily comply with the law before investigation and litigation. It is further argued that a voluntary compliance procedure may substantially reduce the load upon the Commission's staff and, in turn, enable it to expeditiously dispose of, in a proper manner, the case requiring formal action.

*Id.* at 13-14.

138. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 550-51 (1962); see also BNA ANTITRUST & TRADE REG. REP., p. B-4 (Dec. 25, 1962). Cf. Statement of Louis D. Brandeis Before the Federal Trade Commission, April 30, 1915 (mimeo.) p. 9:

[W]here you [the FTC] can do the greatest work is to investigate the facts of trade, and to bring out those facts before you come to a really tight situation; before any great harm is done. Those facts would make the community of businessmen understand the real situation in regard to their business. They do not understand it, in very large part and to a very considerable extent they cannot understand it; they have not the means, and because the information



Businessmen, the argument runs, can use the FTC to accomplish that which the Sherman Act would deny them. They can meet, discuss, and agree upon codes of fair competition; they can soften the rigors of business.

Consider the application of this reasoning to Trade Regulation Rules, which may be initiated either "by the Commission upon its own motion or pursuant to petition therefor filed by an interested party."<sup>139</sup> Long before any notice of a public hearing on a proposed rule is published in the *Federal Register*,<sup>140</sup> the Commission, including its staff, "may conduct such investigations, make such studies, and hold such conferences as it may deem necessary."<sup>141</sup> Representatives of an industry may be brought together in an FTC conference room. "We understand there is a problem regarding selling below cost in your industry," a staff member may say, "Please enlighten us." The way would be opened for discussion, and, indeed, for bringing before all specific facts with a view toward measuring them against the statutory backdrop of unfair methods of competition. In this context roles might be confused; industry members might forget that they are present only to offer information, and not make decisions; the Commission's staff might delegate its function to business, and allow or even encourage them to make a choice which should only be made by the Commission.<sup>142</sup>

There is a clear distinction between industrywide compliance and concerted industry self-regulation.<sup>143</sup> It is the Federal Trade Commission, not industry, that enforces the law. By combination the courts will not permit what becomes in "reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce, and provides extra-judicial tribunals for determination and punishment

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does not exist. Now, you can get them that information. There is where you can be of immense help.

139. FTC R. PRAC., 16 C.F.R. § 1.65 (Supp. 1963).

140. FTC R. PRAC., 16 C.F.R. § 1.66 (Supp. 1963).

141. FTC R. PRAC., 16 C.F.R. § 1.64 (Supp. 1963). Of the National Recovery Administration it was said of public hearings: "Only in exceptional circumstances, when great opposition to provisions of the code were uncovered or unfavorable public reactions were generated, did it greatly affect the gradual forging out of the final form of code provisions, a process which started in the preliminary conferences and was continued and completed in the post-hearing conferences." LYON, HOMAN, TERBORGH, LORWIN, DEARING & MARSHALL, *THE NATIONAL RECOVERY ADMINISTRATION* 112 (1935).

142. Hazards attend industry self-regulation. See, Baum, *Self Regulation and Antitrust: Suppression of Deceptive Advertising by the Publishing Media*, 12 SYRACUSE L. REV. 289 (1961); cf. Statement by former Chairman Kintner, "Good Business Citizenship Requires Maximum Self-Regulation," before a Joint Meeting of the Sales and Advertising Executive Club of St. Joseph Valley, South Bend, Ind., Nov. 2, 1960.

143. *Ibid.*

of violations, and thus 'trenches upon the power of the national legislature.'"<sup>144</sup>

It matters not that business acts in good faith, in the honest belief of what they conceive the law to be; by an agreement among themselves they may not eliminate a specific practice.<sup>145</sup> Of this the Institute of Carpet Manufacturers became acutely aware, when an industry effort to eliminate volume discounts which might have violated the Robinson-Patman Act was attacked under the Sherman Act. By consent decree the Institute and several of its member manufacturers were ordered "to refrain from giving volume allowances or rebates to purchasers of rugs and carpets, or to give volume allowances or rebates to purchasers of rugs and carpets, or to establish what volume allowances or rebates should be give nor not given to various purchasers or classes of purchasers of rugs and carpets, or to establish classifications of customers or to classify customers for the purpose of allowances or rebates."<sup>146</sup>

The decree struck at an agreement by private parties to do that which was the duty of the Government. This the court recognized, for the decree also declared:

If obligations are imposed upon, or rights granted to the defendants, or any of them, by the laws or regulations of any state or of the Federal Government, which are inconsistent with the terms of this decree, the Court, upon application of the defendants or any of them and reasonable notice to the Attorney General, shall from time to time enter orders relieving such defendants, or any of them, from compliance with any requirements of this decree in conflict with such laws or regulations; and the right of the defendants to make such application and to obtain such relief is expressly granted.<sup>147</sup>

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144. *Fashion Originators' Guild v. Federal Trade Comm'n*, 312 U.S. 457, 465 (1941); see also Comment, 30 U. CHI. L. REV. 171, 183 (1962).

145. Consider the following story published in *Advertising Age*, April 13, 1959, p. 2, cols. 1, 2:

At the initiation of its own appliance dealer members, the local Better Business Bureau [Washington, D.C.] had put into effect last month a rule prohibiting any use of comparative prices in ads for electric and gas appliances. Newspapers and radio-TV stations assured BBB they would cooperate.

The experiment got into trouble when several large appliance dealers who are not represented in the BBB staged a revolt. One chain implied that it had been down to the Department of Justice and had been advised that refusal of ads by newspapers and radio and TV stations under such an arrangement might represent an illegal restraint of trade.

146. *Record, United States v. Institute of Carpet Mfrs.*, Civil No. 12-416 (S.D. N.Y. Feb. 6, 1941).

147. *Ibid.*

Several years after the decree was entered the FTC issued complaints charging violation of the Robinson-Patman Act because of the volume discount schedules of certain carpet manufacturers. To some the action of the FTC and of the Justice Department pose a paradox for business:<sup>148</sup> industrywide compliance with the Federal Trade Commission might open those who cooperate to a Sherman Act complaint.

The key to harmonizing and thus eliminating the paradox lies, to repeat, in understanding and distinguishing *Governmental flexible enforcement procedures from business self-regulation*. The role of Government is to promulgate, administer, and enforce rules that make meaningful broad statutory criteria. The role of the business is to assist in enlightening the Government as to the facts, and individually to abide by the law once it is determined.

Recognizing the responsibilities of the Commission carries certain implications: Industrywide enforcement is more difficult and complex than case-by-case enforcement. In a case the sole, albeit large, problem is effective, expeditious trial. An industry project, on the other hand, additionally requires expert coordination both within and without the Commission. Men must be used not singly but in interaction to achieve one goal. This necessarily imposes upon the Commission the task of planning, of making maximum use of its staff.

To illustrate, consider again the potential application of Trade Regulation Rules to the recently announced investigation of "automatic" sewing machines.<sup>149</sup> If the representation "automatic" were challenged as a deceptive claim and litigated, few men would be needed. Indeed, a trial attorney and an attorney investigator might suffice. The Trade Regulation endeavor, however, probably will demand the full energy of several individuals: (1) The facts must be gathered for the purpose of use, for a record. Toward this end, the Trade Regulation attorney may seek the advice and cooperation of both the investigation and litigation arms of the Commission. (2) The trial staff must know the size and structure of the industry, for if cooperation cannot be obtained, and if complaints must issue, such knowledge will form the basis for the selectivity necessary to speedy handling.<sup>150</sup> (3) The Commission, itself, has a role. Once started, the project should move expeditiously. Dockets

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148. See Bigelow-Sanford Carpet Co., Inc., TRADE REG. REP. ¶ 27851 (Complaint issued, Feb. 26, 1959); Mohasco Indus., Inc., TRADE REG. REP. ¶ 27851 (Complaint issued, Feb. 26, 1959). In Hat Corp., Dkt. 7422 (Aug. 11, 1960), the respondent entered a consent order.

149. See note 116 *supra*.

150. It should be noted that the Rules of Practice require Commission counsel to proceed without delay, without further investigation once a complaint issues. See FTC R. PRAC., 16 C.F.R. §§ 4.8, 4.14(d) (Supp. 1963).

must be cleared so that immediate, even preferential, consideration might be given to the industry-wide project. (4) Finally, the appellate staff should be informed, and in turn, be able to offer its guidance in shaping a record adequate in fact content and supported in law so that success on review might be predicted. For these functions a team of capable men, not two individuals, is imperative.

On a higher level, when industrywide projects are adopted as a prime means of enforcement the need for planning is even more acute and perhaps more difficult. The reasons are obvious: (1) A relatively small staff working in teams, rather than individually, necessarily means that there would be fewer projects than cases. No longer could the Commission institute a multitude of complaints covering so many varied types of practices. The agency would be forced to choose, to ascertain, for example, whether the public interest would be better served by a project involving "cigarette health claims" or an "automatic" sewing machine project. (2) Further, there falls upon the Commission the task of viewing the full ramifications of a project, of looking beyond specific facts which it might consider if it were judging a case. The import of this point can be demonstrated by an examination of the "analgesic" cases.

The determined competition between manufacturers and distributors of analgesic drugs largely has taken the form of comparative relief claims: "Bufferin gives pain relief twice as fast as aspirin." Anacin contains "not one pain relieving element but three."<sup>151</sup> Or, "when you have a headache, cold, fever or muscle pain, you want relief—fast, St. Joseph Aspirin is ready to go to work faster to ease your pain and distress—than all three other leading relief tablets."<sup>152</sup>

Responding to the varied, even contradictory claims the Federal Trade Commission issued a number of complaints charging in essence that "in truth and in fact, there is no significant difference between the rate of speed with which other analgesic preparations available and offered for sale to consumers provide relief of pain."<sup>153</sup> The complaints, however, were not brought on for hearing, even before an examiner. "It appears that the Commission, perhaps in preparation for hearings, authorized and financed a study of the five proprietary analgesic compounds by two physicians and a medical statistician."<sup>154</sup> The report

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151. For a discussion of the claims see Baum, *Truthful Disparagement Under the Federal Trade Commission Act*, 51 TRADEMARK REP. 1081, 1094-95 (1961).

152. *Ibid.*

153. See Plough, Inc., Dkt. 8320 (March 14, 1961) at 3-4; see also Sterling Drug, Inc., Dkt. 8321 (March 14, 1961) at 3; Bristol-Myers Co., Dkt. 8319 (March 14, 1961) at 3; American Home Prod. Corp., Dkt. 8318 (March 14, 1961) at 2-3.

154. Federal Trade Comm'n v. Sterling Drug, Inc., TRADE REG. REP., (1963 Trade Cas.) ¶ 70701, at 77808 (S.D.N.Y. March 8, 1963).

completed, the Commission refused to allow its publication though the findings supported those detailed in the suspended complaints. Yet, "after further urging by the doctors that their report should be published in the public interest, the Commission authorized them to publish their findings."<sup>155</sup> Noting the FTC's authorization, the report appeared in the *Journal of the American Medical Association*.<sup>156</sup>

Here trouble commenced. Subjected to intense competition, those companies benefited by the report began a strong advertising campaign to inform the public of the report's contents.<sup>157</sup> The Commission objected to the interpretation placed on the study by the advertisers, and therefore issued a new complaint. Neither the FTC nor the American Medical Association, it was charged, endorsed the published study. More, the report did not conclude that respondent's Bayer Aspirin was more gentle to the stomach than compounded analgesics, nor that Bayer Aspirin affords greater relief than other products at the end of fifteen minutes.<sup>158</sup>

The enforcement problem which the scientific report probably was designed to simplify assumed new dimensions of complexity. Acting under Section 13 of the Federal Trade Commission Act<sup>159</sup> the agency attempted to obtain a temporary restraining order against the maker of Bayer Aspirin. This, as well as an application for a preliminary injunction was denied the Commission by the District Court which reasoned:

We have here, in essence, this situation. For years the general public has been urged to buy higher priced analgesics on the ground that they are more effective than a lower priced one. The consumer has an interest in knowing the facts of this situation, and the Commission is supposed to represent the

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155. *Ibid.* It is not precisely clear from the record as to whether clearance emanated at Commission level.

156. *Ibid.*

157. Sterling Drug, Inc., Dkt. 8554 (amended complaint Jan. 31, 1963). A "typical" advertisement, the complaint charged, was the following statement:

Findings reported in the highly authoritative *Journal of the American Medical Association* reveal that the higher priced combination-of-ingredients pain relievers upset the stomach with significantly greater frequency than any of the other products tested, while Bayer Aspirin brings relief that is as fast, as strong, and as gentle to the stomach as you can get.

This important new medical study, supported by a grant from the federal government, was undertaken to compare the stomach-upsetting effects, the speed of relief, and the amount of relief offered by five leading pain relievers, including Bayer Aspirin, aspirin with buffering, and combination-of-ingredients products.

*Id.* at 3.

158. *Ibid.*

159. 52 Stat. 115 (1938), 15 U.S.C. § 53 (1958).

interests of the consumer. The Commission has had a study made by experts which would seem to indicate that the representations made by the higher priced products are not correct and that the general public can get as good, or better relief from a lower priced product. Why may not a manufacturer of a lower priced product utilize this information which has been developed by the Commission, paid for by the Commission, and *published by authority of the Commission*? If the report of the experts employed by the Commission is accurate, then the public has a right to know those facts. If the report of the experts employed by the Commission is inaccurate, the Commission itself is guilty of promoting false advertising.<sup>160</sup>

The fight for a preliminary injunction continues; the Commission has filed notice of appeal.<sup>161</sup> The resolution of an industrywide problem remains far from sight. Inequitable treatment, which might have been precisely what the agency intended to prevent by the study, has taken place, if the language of the complaint against the manufacturer of Bayer Aspirin is accepted as true.

Publicity, Chairman Dixon testified, was not the answer to the analgesic quandry.<sup>162</sup> Senator Muskie had asked him: "Is this study technique one that is useful to you in your enforcement effort?" Chairman Dixon replied: "Well, I can tell you this, sir, that there will be no more. There will be no more studies published until they have been evaluated completely at the Federal Trade Commission, because you can see exactly what happened here. I don't think they should be."<sup>163</sup> Congress determined that publicity was to be invoked only as an aid to enforcement. The Commission was to assume the heavy burden of compliance; such matters were not to be delegated to the public.

Here the Commission had mastered the facts. Yet this was but a part of the total task which it faced. There remained the decision as to how the facts could best be utilized to effect the statutory end, namely, the elimination of false, misleading or deceptive advertising. It did not suffice merely to recognize the existence of a pervasive practice. It was vital for the Commission to fathom the interaction of the industry members, and to devise a remedy that would protect the public and if possible be fair to competitors.

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160. Federal Trade Comm'n v. Sterling Drug, Inc., TRADE REG. REP. (1963 Trade Cas.) ¶ 70701, at 77811-12 (S.D.N.Y. March 8, 1963). (Emphasis added.)

161. TRADE REG. REP., News Letter No. 83 at 4 (March 25, 1963).

162. Quoted by the District Court in Federal Trade Comm'n v. Sterling Drugs, Inc., *supra* note 160, at 77809 n.

163. *Ibid.*

Planning was needed. Industry projects cannot be viewed narrowly; they cannot be dealt with pragmatically. They must be thought through, from beginning to end. In a sense the machinery for planning, at least partially, has been created. The Commission's Rules of Practice provide for a Program Review Officer whose responsibility it is "to make reports and recommendations directly to the Commission with respect to how and where its functions should be exercised in order to best serve the public interest."<sup>164</sup> In allowing for the position the agency has recognized the need. Whether one man, the Program Review Officer, can fully meet the need is another question, the answer to which depends upon how much use he can make of the Bureau of Industry Guidance, for nowhere within the Commission other than this Bureau, and, more precisely the Trade Regulation Rule Division, is concern given to total enforcement. Thus, a staff is available to the Program Review Officer; a beginning might be made.

All may come for naught, however, unless the Commission itself has the time, and therefore the freedom, to shape the efforts of the staff and give direction to enforcement. Again, the need to clear cluttered dockets has been accepted as a worthy objective. Commissioners, it was said, ought to "be able to devote themselves to adjudications and to making important policy decisions."<sup>165</sup> Again, the machinery exists for attaining the goal. Under Reorganization Plan No. 4 the Chairman is empowered to delegate many of the Commission's functions either to individual Commissioners or the staff.<sup>166</sup> The Rules of Practice impose the strictures of certorari in appeals from examiner rulings.<sup>167</sup> Save in a few instances, however, little has been done to fully implement either innovation. Appeals generally are granted, and only minimum use has been made of the delegation power.<sup>168</sup> More, each Commissioner's work

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164. FTC, STATEMENT OF ORGANIZATION ¶ 4(a), TRADE REG. REP. ¶ 9835.04 (1959). However, on the Commission's organization chart the Program Review Officer does not appear to be directly responsible to the full Commission, but to the Executive Director.

165. Address by Chairman Dixon before the National Industrial Council's Manufacturing Trade Associations Group, Dec. 5, 1961, p. 12.

166. 26 Fed. Reg. 6191 (1961).

167. FTC R. PRAC. 16 C.F.R. § 4.20 (Supp. 1963). For interlocutory appeals the Rules seem to imply even stricter requirements. See § 4.18.

168. Under the Reorganization Plan the following grants of delegation have been made: To determine interlocutory motions the Commission has empowered the Chairman to name one of their number as Motions Commissioner. Aside from antimonopoly cases bureau directors and assistant directors now may close docketed investigational files. They also may allow additional time for compliance with investigational orders. The directors and assistant directors in the Bureaus of Restraint of Trade, Deceptive Practices, and Textiles and Furs may initiate investigations. WESTON, DEVELOPMENTS IN ANTITRUST DURING THE PAST YEAR 122 (1961).

load has increased, and the predictions are for an upward trend as requests for advisory opinions mount.<sup>169</sup>

Planning stands as a significant element in any industrywide enforcement program. It requires both thought and coordination within and without the agency. Absent planning, effectiveness cannot be expected. It is difficult to state how much more the Federal Trade Commission must do to place itself in a position to plan; it can only be stated here that much remains to be accomplished before industrywide enforcement can become a reality.<sup>170</sup>

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Commissioner Elman recently suggested a partial delegation of the Commission's complaint-issuing function to bureau directors. *BNA ANTITRUST & TRADE REG. REP.*, p. A-16 (Oct. 16, 1962).

169. During fiscal 1962 the Bureau of Industry Guidance received 107 requests for advisory opinions. As of Nov., 1962, opinions were given in 14 matters. Letter from Bryan H. Jacques, Director, Bureau of Industry Guidance, to the *Indiana Law Journal*, Dec. 10, 1962.

A warning of inundation was sounded by Commissioner Anderson. See, *BNA ANTITRUST & TRADE REG. REP.*, p. A-10 (July 3, 1962), and A-18 (Nov. 20, 1962).

170. The statement of Edward K. Mills, Jr., upon his resignation as a member of the Federal Trade Commission, March 1, 1961, after only a few months of service bears repeating:

I believe the Commission would benefit from a long-range program planning approach to its responsibilities in the particular industries or areas where the economic impact of its action could most help the national economy. Too often the entry of FTC into a certain industry or area has been by happenstance, rather than by carefully considered plan or intent, by reason of an application for complaint, or an announced merger plan, or an apparent violation of existing law. A small planning group, working closely with the five members of the Commission, could develop a long-range program as to what industry or industries, or what methods or practices, most need corrective action. A broad long-range plan, and an order of priority based on available staff, would serve as the blueprint for FTC action in the future. With such a plan the Commission, as well as industry, would know better what it was doing and where it was going.

While I appreciate that statistics in terms of the number of actions brought by the Commission are evidence of aggressive law enforcement, the mere volume of work is of itself but one index of this agency's effectiveness. Of even greater importance is that major business evils be assessed from the standpoint of their impact on the public welfare and that the most harmful and substantial abuses be challenged first, regardless of how much or how little they may contribute to the statistical box-score.

I also think the Commission should delegate more authority to its individual members, to its hearing examiners, and to certain of its staff officials in order to speed the handling of its workload without adding substantial numbers of new employees to the staff. Single commissioners could dispose of many matters which now occupy the time of the full Commission, making possible greater emphasis on program planning, particularly in the antitrust field, by the Commission as a whole.

Also I believe that FTC's present dual approach looking toward improved business methods and practices is sound. To those businesses which truly desire to cooperate with government, the helping hand of education and voluntary compliance should be offered. To the minority of recalcitrants the prosecutive paddle should be applied. The transgressions of a first and minor offender could certainly be treated with less formality than those of the seasoned and



Finally, assuming the ideal can be realized, will the new programming resolve all problems? Will an industrywide view prove the panacea for meaningful agency administration? The response clearly is, "No." There are enforcement problems which simply cannot be met with the existing power, regardless of how imaginatively it might be exercised. The harsh realization of this fact forced itself on the Commission when it tested the scope of investigational hearings.<sup>171</sup>

From Indianapolis, Indiana, arrived reports of a sustained milk price war waged by supermarkets.<sup>172</sup> The effect of any lengthy selling below cost of this single product on independent dairies or milk carryout stores needs slight comment.<sup>173</sup> Yet, what could the Commission do if the law were being violated?<sup>174</sup> Facts had to be gathered, and evaluated.

unrepenting violator of the law. Voluntary compliance, where obtainable, is a far less costly, and more comprehensive, solution than formal litigation.

171. FTC R. PRAC., 16 C.F.R. §§ 1.34-41 (1960) until recently modified in *Mead Corp.*, File No. 571-0656, 13 PIKE & FISCHER ADMIN. LAW 117 (Jan. 3, 1963) embodied the procedure for the conduct of both public and non-public hearings.

The test of public hearings did not, however, begin in Indianapolis with grocery chains, but rather on Dec. 28, 1961 with the *St. Regis Paper Co.*, at whose hands the Commission suffered many frustrations in an effort to subpoena facts in an antimerger inquiry. [For a background of the fight for the facts see, *St. Regis Paper Co. v. Federal Trade Comm'n*, 368 U.S. 208 (1961).] Stating the Commission's reasons for the public hearing the Chairman declared in his opening statement at p. 2:

Thus, for more than five years the Commission has been unsuccessful in its efforts to obtain the basic information needed to determine whether the law has been violated. During these five years, *St. Regis* has continued to acquire the stock or assets of other corporations. *St. Regis* and its officials have been afforded every opportunity to cooperate in the investigation and to furnish the needed information. This has not been done. The Commission deems it in the public interest to conclude this investigation as expeditiously as possible and to make an early determination as to whether any or all of the acquisitions by *St. Regis* are likely to have the effects on competition prohibited by Section 7 of the Clayton Act.

172. See Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss in Record, *Hall v. Lemke*, Civil No. 62-C-942 (N.D. Ill. 1962) p. 11: Numerous proprietors of the small so-called "mom and pop" stores in the Indianapolis area testified to the effect that the so-called "loss leader" selling of milk on the part of the interstate retail chains under investigation had not only hurt their milk sales but had hurt their other sales as well, because milk is a traffic-producing product and brings customers into the store. Some of the local chain stores admitted to sales below cost, while others stated that they met the price situation by receiving a special competitive allowance from their suppliers.

173. See the *Indianapolis Star*, Sept. 19, 1962, p. 17, col. 4. The *Polk Sanitary Milk Company* of Indianapolis, one of the area's larger dairies, was placed in receivership.

174. Sustained selling below cost in theory might be attacked either under § 5 of the Federal Trade Commission Act, *E. B. Muller & Co. v. Federal Trade Comm'n*, 142 F.2d 511 (6th Cir. 1944), or as primary price discrimination under § 2(a) of the *Robinson-Patman Act*, *Federal Trade Comm'n v. Anheuser-Busch, Inc.* 363 U.S. 536 (1960); *Puerto Rican American Tobacco Co. v. American Tobacco Co.*, 30 F.2d 234 (2d Cir.), *cert. denied*, 279 U.S. 858 (1929). Cf. *United States v. National Dairy Prod. Corp.*, TRADE REG. REP. (1963 Trade Cas.) ¶ 70666 U.S. S. Ct. Feb. 18, 1963).

Should a complaint issue, hearings would follow, and then surely an appeal. Time would be consumed—a great deal of time<sup>175</sup>—where a week or a month of prolonged battle could spell total destruction for the victim.

Why not conduct a public hearing in the city where the practice is rampant? Bring the facts into the open; see what they imply. Though there may be no violation of law, there might well be the need for new legislation. Subpoena the relevant parties for both documents and testimony.<sup>176</sup> Let all be in the public record.<sup>177</sup> Further, to expedite the investigation, counsel for witnesses summoned should be denied any right other than to advise their client. Cross-examination has no place in an investigational hearing.<sup>178</sup> The agency, arguing that it was vested with the same prerogatives as Congress for purposes of investigation, determined to test that power.<sup>179</sup>

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175. Such hearings might well take two to three years for completion. See *Hearings on H.R. 12711 before the Subcommittee of the Senate Appropriations Committee*, 87th Cong., 2d Sess. 973 (1962).

176. Having first limited its subpoena to information concerning the sale of milk in a single geographic area, the Commission later broadened it to include all dairy products in all areas.

177. Chairman Dixon testified:

But I think basically, sir, an investigation is fairer in public. . . . If you call a person in public, then anything he says, anybody in the public has access to. He may say something that somebody else disagrees with and he wants to appear and correct the record.

If you call him in private, another party cannot see what the other fellows said. And when you get at the end of the thing, you have various conflicts to judge, instead of having a complete record.

*Id.* at 975.

178. Opening the Indianapolis hearings on March 13, 1962, the Examiner said: The examiner wished to emphasize to counsel that this is an investigational hearing, and is not an adjudicative proceeding. Counsel's participation extends only to advising a witness. This is not the forum for objections or statements by counsel, and they cannot be permitted.

If counsel wishes to present written statements they will be accepted and given full consideration after completion of this investigational hearing. If counsel has objections they may be made at the proper time in the event adjudicative proceedings are instituted following the investigation. (Emphasis added.)

179. The statutory basis for the Commission's position rests upon §§ 6(a), (f) of the Federal Trade Commission Act, 38 Stat. 721 (1914), 15 U.S.C. § 46(a), (f) (1958), which provide:

The Commission shall also have power . . . To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce. . . . To make public from time to time such portions of the information obtained by it . . . except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation. . . .

The Commission believes that it is in the interest of the public that the public be fully advised concerning its investigation into the production, distribution and sale of dairy products. Investigations involving such staple commodities as dairy products are fraught with public interest and the Commission was well advised to keep the public fully informed in order that no possible confusion could be created concerning the proceedings.<sup>180</sup>

The response to the test was immediate. In a letter to Chairman Dixon the American Civil Liberties Union declared:

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With assurance the Commission could point to recent decisions which allowed broad scope to its investigative power. *United States v. Morton Salt Co.*, 338 U.S. 632 (1950); *Hunt Food & Indus., Inc. v. Federal Trade Comm'n*, 286 F.2d 803 (9th Cir. 1960). The power is not limited to those cases where the agency believed a violation of law existed. More, the fruit of the investigation might be made public, for the Supreme Court declared in *United States v. Morton Salt Co.*, *supra* at 652 (Emphasis added):

While they may and should have protection from unlawful demands made in the name of *public investigation*, *cf. Federal Trade Comm'n v. American Tobacco Co.*, 264 U.S. 298 . . . corporations can claim no equality with individuals in the enjoyment of a right to privacy. . . . They are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities. The Federal Government allows them the privilege of engaging in interstate commerce. Favors from government often carry with them an enhanced measure of regulation. . . . Even if one were to regard the request for information in this case as caused by nothing more than official curiosity, nevertheless *law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest.*

Finally, another agency was permitted by the Supreme Court to deny rights such as cross-examination, which would accrue in an adversary proceeding. *Hannah v. Larche*, 363 U.S. 420 (1960). Indeed, the Court even referred to the Federal Trade Commission in its decision:

A typical agency is the Federal Trade Commission. Its rules draw a clear distinction between adjudicative proceedings and investigative proceedings. 16 CFR, 1958 Supp., § 1.34. Although the latter are frequently initiated by complaints from undisclosed informants, *id.*, §§ 1.11, 1.15, and although the Commission may use the information obtained during investigations to initiate adjudicative proceedings, *id.*, § 1.42, nevertheless, persons summoned to appear before investigative proceedings are entitled only to a general notice of "the purpose and scope of the investigation," *id.*, § 1.33, and while they may have the advice of counsel, "counsel may not, as a matter of right, otherwise participate in the investigation." *Id.*, § 1.40. The reason for these rules is obvious. The Federal Trade Commission could not conduct an efficient investigation if persons being investigated were permitted to convert the investigation into a trial. We have found no authorities suggesting that the rules governing Federal Trade Commission investigations violate the Constitution, and this is understandable since any person investigated by the Federal Trade Commission will be accorded all the traditional judicial safeguards at a subsequent adjudicative proceeding, just as any person investigated by the Civil Rights Commission will have all of these safeguards, should some type of adjudicative proceeding subsequently be instituted.

*Hanna v. Larche*, *supra* at 446.

180. Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss, Report, *Hall v. Lemke*, Civil No. 62-C-942 (N.D. Ill. 1962) at p. 31.

There are two civil liberties aspects of this controversy which gravely disturbs the Union and which we urge the Commission seriously to consider. One is the holding of an investigatory hearing, analogous to a grand jury investigation, in public. The second concerns the failure to allow counsel for companies under investigation adequate participation in the hearing in behalf of their clients. Both combine to create a breach of the safeguards embodied in the idea of due process of law, the touchstone of our democratic system which should be especially respected in the relationship between the government and the citizen.<sup>181</sup>

Officers of the Kroger Company called before the special hearing gave their own answer; they refused to testify.<sup>182</sup> It was not enough for them

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181. Letter from John de J. Pemberton, Jr., Executive Director, American Civil Liberties Union, to Chairman Dixon, April 20, 1962, reprinted in ACLU Press Release, May 7, 1962, New York, N.Y. Referring to *United States v. Morton Salt Co.*, 338 U.S., 632 (1950) Mr. Pemberton wrote:

If an administrative investigatory proceeding is, as we agree with Justice Jackson, directly parallel to a grand jury investigation, it follows that the standards and protections governing the latter should apply equally to the former. High on the list of these guarantees is the non-public character of investigatory proceedings. This right to privacy is one of the integral elements of due process because it assures the individual—or the company—that they are not considered to have engaged in a wrongful act until sufficient evidence has been accumulated to warrant a specific indictment—until they know the charges and can prepare to defend themselves at a subsequent trial.

A public fact-finding investigation, by its very nature, can't offer this protection; indeed it places the individual—or company—in a position where the search for information about them is secondary and primarily they are regarded as having been charged with committing an offense. The experience of congressional investigating committees probing Communist influence in the last 15 years amply illustrates this. These inquiries made crystal-clear that in an hostile, accusatory atmosphere created by such hearings persons brought publicly into the investigation are stigmatized and regarded as having been involved in some kind of wrongdoing. The American Civil Liberties Union has protested congressional inquiries concerned mainly with "exposure for exposure's sake," and the United States Supreme Court in *Watkins v. U.S.*, concluded that such investigations are improper.

We refer to the congressional committee investigation because we read in the March 25 *Washington Star* that the FTC's public investigatory hearings are following the form of congressional hearings. But we submit there is a significant difference between these two kinds of hearings, a difference which places a greater responsibility on the FTC to adhere scrupulously to fair procedures. Unlike the congressional committee whose authority rests on obtaining information on which the Congress can act to write new laws, the FTC itself can use the information it gathers in investigatory hearings in a later adjudicatory hearing which can result in an order or the imposing of sanctions where a violation is found to exist. As the Commission serves as investigator, grand jury, and judge, it should take special pains to afford all the due process protections of a judicial proceeding.

182. *Hall v. Lemke*, TRADE REG. REP., (1962 Trade Cas.) ¶ 70338 (N.D. Ill. May 7, 1962).

that the Commission agreed to place trade secrets *in camera* or that statements would be permitted following the presentation of testimony.<sup>183</sup> Rather, they asked the Commission to quash the subpoenas, and this being denied, sought and obtained a temporary restraining order.<sup>184</sup>

In Congress<sup>185</sup> and before the Administrative Conference<sup>186</sup> the public investigational hearing was considered. Chairman Dixon testified before a Senate Subcommittee:

Now, we set out to hold them [the hearings] in public and then all the devil broke loose. We were accused of violating everything in the constitution. . . . [The] bar made much of it and we were willing to go on and have it decided by the court. But then we realized we had another obligation. The court wasn't going to decide it quickly enough. The last thing we found out is a judge in Chicago, passing on a temporary restraining order in that court, rather than doing it within ten days, he had extended it way up until September before he was even going to pass on it.

So we said, "Well, we will just draw back and change this to executive [non-public hearings] because we don't know but what we might find law violations and we have got to do a better job than wait because you can't wait forever when these are going on." We tried. We have surrendered. But that question will eventually have to be resolved.<sup>187</sup>

From the Administrative Conference came recommendations adopted after study and debate implementing and clarifying Section 6(a) of the Administrative Procedure Act which allows one summoned before an agency the right to be "accompanied," "advised" and "represented" by counsel.<sup>188</sup> Pointedly the conference asked that

the right to counsel be interpreted with a view to preserving the highest concept of administrative fairness and as generously as reasonable administrative efficiency permits. Agencies should recognize that the right to counsel, including, to the extent appropriate, opportunity for cross-examination and pro-

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183. *Ibid.*

184. *Ibid.*

185. See *Hearings on H.R. 12711 before the Subcommittee of the Senate Appropriations Committee*, 87th Cong., 2d Sess. 973-75 (1962).

186. See FINAL REPORT OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, Dec. 15, 1962, at p. 19.

187. *Hearings on H.R. 12711, supra* note 185, at 974.

188. FINAL REPORT, *supra* note 186 at 19.

duction of limited rebuttal testimony or documentary evidence, is particularly important to any person involved in a public investigation where implications of wrongdoing by that person are made a part of the public record.<sup>189</sup>

Following the issuance of another temporary restraining order, this time applied to a *closed, or executive investigational hearing*,<sup>190</sup> the Commission accepted in principle many of the Administrative Conference's suggestions stating: "We should not attach to past procedural practices a sacredness that prohibits reexamination."<sup>191</sup>

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189. *Id.*, Recommendation 15(2). Specifically, the following standards were suggested by the Conference:

(a) The right to be "accompanied" by counsel means the right of any person compelled to appear before any agency or agency representative to have counsel present with him during any proceeding or investigation. (b) The right to be "advised" by counsel means that any person compelled to appear in person shall be entitled to the advice in confidence of counsel before, during, and after the conclusion of any agency proceeding or investigation for which his presence is compelled. (c) The right to be "represented" by counsel means as a minimum that counsel for any person compelled to appear in person shall be permitted to make objections on the record and to argue briefly the basis for such objections in connection with any examination of his client. (d) In addition, each agency is urged to re-examine its rules and practice and to effect appropriate changes therein to the extent that it determines that it can properly permit persons compelled to appear in person in any agency proceeding or investigation to be examined further for the record by their own counsel following other questioning.

190. *Wanderer v. Kaplan*, TRADE REG. REP. (1962 Trade Cas.) ¶ 70462 (D.D.C. Sept. 5, 1962).

191. *Mead Corp.* File No. 571-0656, 13 PIKE & FISCHER ADMIN. LAW 117 (Jan. 3, 1963). The following rules were promulgated by the Commission:

1. A witness may have present with him counsel of his own choice.
2. Counsel for a witness may advise his client, in confidence, and upon the initiative of either himself or the witness, with respect to any question asked of his client, and if the witness refuses to answer a question, then counsel may briefly state on the record if he has advised his client not to answer the question and the legal grounds for such refusal.
3. Where it is claimed that the testimony or other evidence sought from a witness is outside the scope of the investigation, or that the witness is privileged (for reasons other than self-incrimination, as to which immunity from prosecution or penalty is provided by Section 9 of the Federal Trade Commission Act) to refuse to answer a question or to produce other evidence, counsel for the witness may object on the record to the question or requirement and may state briefly and precisely the grounds therefor.
4. Any objections made under these rules will be treated as continuing objections and preserved throughout the further course of the hearing, without repeating them as to any similar line of inquiry. Cumulative objections are unnecessary and repetition of the grounds for any such objection will not be allowed.
5. Counsel for a witness may not, for any purpose or to any extent not allowed by paragraphs 2 and 3, interrupt the examination of the witness by making any objections or statements on the record. Motions challenging the Commission's authority to conduct the investigation or the sufficiency or legality of the subpoena must have been addressed to the Commission in advance of the hearing. Copies of such motions may be filed with the hearing officer as part of the record of the investigation; but no arguments in support thereof

The experiment, though the product of imagination, failed. The tools at the Commission's disposal were not adequate to meet the exigencies of a price war. If the public investigational hearing were an adversary proceeding, an assumption the Commission denied, the full right of counsel, including cross-examination attached. If the hearings were designed to gather facts in aid of legislation, the condition of impartial study was absent, for the spotlight of publicity was shining on the witness.

The Commission possessed no substitute for that which the Congress so far has refused to grant, namely, the temporary injunction.<sup>192</sup> Reorganized and revised rules of practice can only "shorten the case that has been taking 5 or 6 years and pull it down to 3 years."<sup>193</sup> And a sustained price war which forces the sale of products below cost is just such a case. Chairman Dixon graphically described the problem recently:

But I will assure you that if in the State of Colorado there are business people that are being subjected to sales beneath cost, beneath their cost and beneath somebody else's cost, and every time he sells something, whether it is milk or potatoes or whatever it is, he is losing money, he is not going to be around 3 years while we sue this big national party that is in that area just turning the screw on that little fellow. . . .<sup>194</sup>

## V. CONCLUSION

Compliance, not publicity, was the congressionally assigned burden

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will be allowed at the hearing.

6. Following completion of the examination of a witness, counsel for the witness may on the record request the officer conducting the hearing to permit the witness to clarify any of his answers which may need clarification in order that they may not be left equivocal or incomplete on the record. The granting or denial of such request shall be within the sole discretion of the officer conducting the hearing.

7. The officer conducting the investigation shall take all necessary action to regulate the course of the hearing to avoid delay and to prevent or restrain disorderly, dilatory, obstructionist, or contumacious conduct. Such officer shall, for reasons stated on the record, immediately report to the Commission any instances where an attorney has refused to comply with his directions, or has been guilty of disorderly, dilatory, obstructionist, or contumacious conduct in the course of the hearing. The Commission will thereupon take such further action, if any, as the circumstances warrant, including suspension or disbarment of the attorney from further practice before the Commission, or exclusion from further participation in the particular investigation.

192. Such proposals have been made. H.R. 8830, H.R. 8831, and S. 2552, 87th Cong., 1st Sess. (1961). See also Address by Commissioner MacIntyre, "The Proposal for Authority to Issue Temporary Cease and Desist Orders," before the Conference on Antitrust Laws and Trade Regulations, Federal Bar Association, Washington, D.C., Jan. 4, 1962.

193. *Hearings on H.R. 12711*, *supra* note 185, at 972.

194. *Id.* at 972-73.

to the Commission. Sweeping power and broad discretion were the tools given to accomplish the end. The Commission faced the difficult task of making maximum use of that which was granted. It soon found that effective compliance meant to some extent industrywide compliance. Unfair practices, like Gresham's Law, compelled competitors to the same level.

Alone, the case-approach was inadequate. Use had to be made of the informal procedures. Toward this end the agency has made some progress through, for example, the Trade Regulation Rule Division. In the doing it has also encountered problems. Where the judicialized character of case proceedings kept business at arm's length, the informal approach lowers this barrier. There is the danger of innocent subversion, of business assuming or having delegated to it the functions which are solely those of the Commission. And, equally important, there is the problem of planning. Where a case demands the energy of a few, industry projects demand the efforts of many.

The Commission recognizes the problems of enforcement. Its slowness in adopting new techniques is understandable; limited funds should not be funneled into an experiment that might fail. There remains an economy, both enormous and complex, to study and maintain. To these considerations must be added others. The Commission, though characterized as an independent agency, is buffeted both by congressional and business pressures each with a view as to how the agency might better meet its statutory obligations. The end result of multifaceted pressures might well blunt effective Commission action.